83-297

Office-Supreme Court, U.S.
FILED
AUG 23 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ARMCO INC.,

Appellant,

v.

DAVID C. HARDESTY, JR.,
State Tax Commissioner of West Virginia,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

RICHARD R. DAILEY
Counsel of Record
EDWARD H. HEIN
MICHAEL J. RUFKAHR
153 East 53rd Street
New York, New York 10022
Telephone: (212) 888-0800
Attorneys for Appellant
Armco Inc.

Of Counsel

BREED, ABBOTT & MORGAN
153 East 53rd Street
New York, New York 10022
Telephone: (212) 888-0800

August 23, 1983

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether the Due Process Clause and the Commerce Clause require a substantial nexus between a state levying a gross receipts tax on sales outside the state and the activity or transaction subjected to such tax.

2. Whether the "unitary business" principles applicable with respect to taxes on net income may be extended to state gross receipts taxes so as to permit a finding of sufficient nexus by reason of a taxpayer's activities in the taxing state otherwise unrelated to the taxed transaction.

3. Whether the Commerce Clause prohibits a state from imposing a non-apportioned gross receipts tax on wholesale sales of property manufactured outside the state, where an exemption from the tax is provided with respect to the wholesale sales of property manufactured within the state.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions	2
Statement of the Case	2
The Questions Presented Are Substantial	5
I. The Decision Below Is In Irreconcilable Conflict With The Decision Of This Court In *Norton Co. v. Dep't of Revenue of Illinois*, 340 U.S. 534 (1951)	6
II. The Decision Below Is Incorrect In Holding That Nexus Established By Application Of The Unitary Business Principle Is Sufficient To Validate A Gross Receipts Tax Under The Commerce And Due Process Clauses	11
III. The Decision Below Does Not Correctly Apply The Anti-Discrimination Standard For Testing Conformity With The Commerce Clause	13
Conclusion	15

APPENDIX

A. Opinion of the Supreme Court of Appeals of West Virginia	1a
B. Opinion and Order of the Circuit Court of Kanawha County, West Virginia	25a

PAGE

C. Administrative Decision of the Tax Department of West Virginia 37a

D. Final Order Entered by the Supreme Court of Appeals Reversing the Judgment of the Circuit Court 51a

E. Notice of Appeal 53a

F. Designation of Corporate Relationships..... 55a

G. Constitutional and Statutory Provisions..... 57a

TABLE OF AUTHORITIES CITED

Cases	PAGE
Alaska v. Sears, Roebuck, 660 P.2d 1188 (Alaska 1983)	5
American Oil Co. v. Neill, 380 U.S. 451 (1965)	10
Asarco, Inc. v. Idaho State Tax Commissioner, 102 S. Ct. 3103 (1982)	12
Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977)	13
Chicago Bridge & Iron Co. v. State Dep't of Revenue, 98 Wash. 2d 814 (1983)	5
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)	6, 10
Container Corp. of America v. Franchise Tax Board, 103 S. Ct. 2933 (1983)	5, 12, 14
Exxon Corp v. Wisconsin Dep't of Revenue, 447 U.S. 207 (1980)	5, 11, 12
F.W. Woolworth Co. v. Taxation and Revenue Dep't of New Mexico, 102 S. Ct. 3128 (1982)	12
General Motors Corp. v. Washington, 377 U.S. 436 (1964)	8, 9, 12
Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980)	12
National Geographic v. California Bd. of Equalization, 430 U.S. 551 (1977)	10, 12
Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959)	5, 12
Norton Co. v. Dep't of Revenue of Illinois, 340 U.S. 534 (1951)	5, *passim*

PAGE

Standard Pressed Steel Co. v. Washington Dep't of Revenue, 419 U.S. 560 (1975) 8, 12

United States Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1918) 11, 12

Constitution

U.S. Const. art. I, § 8, cl. 3 2

U.S. Const. amend. XIV 2

Statutes

28 U.S.C. § 1257(2) 2

15 U.S.C. §§ 381-384 12

W. Va. Code § 11-13-1 2

W. Va. Code § 11-13-2 2

W. Va. Code § 11-13-2a 2

W. Va. Code § 11-13-2b 2

W. Va. Code § 11-13-2c 2

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ARMCO INC.,

Appellant,

v.

DAVID C. HARDESTY, JR.,
State Tax Commissioner of West Virginia,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

Appellant, Armco Inc., appeals from the final order of the Supreme Court of Appeals of West Virginia ("West Virginia Supreme Court") which reversed a judgment of the Circuit Court of Kanawha County, West Virginia ("Circuit Court"). The Circuit Court had held that the activities in West Virginia of certain product divisions of Armco were not sufficient to permit imposition of the West Virginia business and occupation tax on the gross receipts from sales made by these divisions to customers in West Virginia.

A Designation of Corporate Relationships pertaining to Armco is, pursuant to Rule 28.1, found at Appendix F below.

OPINIONS BELOW

The opinion of the West Virginia Supreme Court (Appendix A) has not been officially reported, but may be found at 303 S.E.2d 706 (1983). The opinion of the Circuit Court (Appendix B) is not reported.

JURISDICTION

The West Virginia Supreme Court rendered its opinion and entered a final order on May 25, 1983 reversing the judgment of the Circuit Court, from which appeal to the West Virginia Supreme Court had been taken. A Notice of Appeal (Appendix E) was filed in the West Virginia Supreme Court on August 19, 1983. The time within which to docket this appeal in this Court expires on August 23, 1983, and timely docketing has been made. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Commerce Clause (Art. I, § 8, cl. 3) and Due Process Clause (Amend. XIV) of the United States Constitution.

West Virginia Code, §§ 11-13-1, 11-13-2, 11-13-2a, 11-13-2b, and 11-13-2c.

These constitutional and statutory provisions are reproduced in pertinent part as Appendix G.

STATEMENT OF THE CASE

West Virginia imposes a business and occupation privilege tax upon the gross receipts realized from wholesale sales of tangible property by persons engaging or continuing within the state in the business of selling any tangible property. An exemption from this tax is provided with respect to property

manufactured in West Virginia. This appeal challenges the constitutionality of this tax where applied to sales consummated outside West Virginia, the majority of which were also solicited outside West Virginia.

Armco is an Ohio corporation headquartered in Middletown, Ohio. During the relevant years (1970-1975) Armco was engaged in the business of mining, cleaning and selling coal at several mines in West Virginia. No issue is presented on this appeal as to West Virginia taxes imposed on Armco's coal mining operations.

Three manufacturing divisions of Armco sold goods manufactured outside West Virginia to wholesale customers within that state during the period involved here. In each case these sales were completely unrelated to Armco's West Virginia coal mining operations. In addition, these sales were consummated outside West Virginia, and title to the goods passed when they were delivered to a common carrier outside West Virginia for shipment into the state. These Armco divisions were the following:

The Steel Group. Armco's Steel Group manufactured steel outside West Virginia which it sold to wholesale customers in various states including West Virginia. The Steel Group maintained no office or inventory of steel in West Virginia, and none of its salesmen were residents of West Virginia. The sole connection between the Steel Group and West Virginia was that its Cincinnati and Pittsburgh offices each sent two salesmen into West Virginia once every four to six weeks. These salesmen were not authorized to accept or reject orders. Moreover, the majority of sales of steel shipped to West Virginia were to wholesale customers whose orders were both solicited and obtained outside West Virginia.

The Wire Rope Group. The activities of the Wire Rope Group in West Virginia were similar in every respect to those of the Steel Group, except that it employed one salesman who visited West Virginia once or twice a month.

The Metal Products Division. The Metal Products Division maintained an office in West Virginia during the relevant period which was responsible for sales of all of the products of this Division except metal buildings. No issue is presented on this appeal with respect to these sales from the West Virginia office. The Division's sales of metal buildings in West Virginia were in every respect similar to those of the Steel Group and the Wire Rope Group, except that the Metal Products Division employed no salesmen to sell metal buildings in West Virginia. Rather, the metal buildings were sold by independent franchisees who were West Virginia residents.

Armco commenced its judicial challenge to the West Virginia business and occupation tax in the Circuit Court by petitioning that court to review a prior administrative decision of the State Tax Department of West Virginia which had sustained an assessment contested by Armco. Armco had petitioned for reassessment upon the ground that the state is prohibited under the Due Process Clause and Commerce Clause of the Constitution from taxing sales by Armco which take place outside of the state and have no contact with the state other than occasional solicitation within the state, and upon the ground that the state's tax scheme discriminates against interstate commerce in violation of the Commerce Clause.

The Circuit Court sustained Armco's challenge on the ground that no substantial nexus existed between the state and the described transactions; having so held, that Court did not reach the question of discrimination against interstate commerce. On appeal, the West Virginia Supreme Court reversed the Circuit Court, holding (i) that a substantial nexus between West Virginia and the sales transactions in question was not required to uphold the tax, and (ii) that Armco's claim that the statute discriminates against interstate commerce was without merit.[1]

---

1 The West Virginia Supreme Court also remanded the case to the Circuit Court solely for the ministerial purpose of computing the tax due. All of the issues involved were fully and finally adjudicated by the opinion and order of the West Virginia Supreme Court (Appendices A and D).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented in this case are substantial and merit plenary consideration for three reasons.

First, the decision of the West Virginia Supreme Court is in irreconcilable conflict with the decision of this Court in *Norton Co. v. Dep't of Revenue of Illinois*, 340 U.S. 534 (1951), although the courts of other states continue to accept *Norton* as governing law. *See, e.g., Alaska v. Sears, Roebuck*, 660 P.2d 1188 (Alaska 1983); *Chicago Bridge & Iron Co. v. State Dep't of Revenue*, 98 Wash. 2d 814 (1983). In its opinion, the West Virginia Supreme Court tacitly acknowledges the conflict with, and attempts to justify its disregard of, *Norton*, by concluding that a "weakening of *Norton*" may be inferred from subsequent decisions of this Court.

Second, the decision of the West Virginia Supreme Court extends to unapportioned gross receipts taxes the "unitary business" principle developed in, and heretofore confined to, net income tax cases. *E.g., Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207 (1980); *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933 (1983). Extension of the unitary business principle and consequent obliteration of the long recognized distinction between apportioned net income taxes and unapportioned gross receipts and other similar direct taxes could well have an impact on the business community and states' tax practices equivalent to that of this Court's decision in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

This case squarely presents the question whether *Norton* remains valid or has been superseded by the "unitary business" principles. Because the decision below incorrectly concludes that *Norton* has in effect been overruled by this Court and relies extensively on *Exxon Corp.*, a *per curiam* affirmance of that decision would compound existing, and generate additional, confusion with respect to the scope of a state's power to subject extraterritorial transactions to gross receipts taxes. Even if this Court chooses to abandon the *Norton* doctrine, it

should be overruled only after plenary consideration, and not inferentially by a summary affirmance here.

Third, the decision below incorrectly decides important Constitutional questions by misapplying the anti-discrimination prong of the test enunciated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), for determining the constitutionality of state assertions of taxing authority over interstate commerce.

The issues presented by this case can arise whenever a state seeks to impose a gross receipts tax on transactions conducted outside that state by an out-of-state taxpayer with other unrelated activities within the state. Thus, the questions raised here are of fundamental importance to the taxing authorities of all states and political subdivisions thereof which now impose a tax measured by a taxpayer's gross receipts or which may contemplate doing so in the future and to persons making sales in interstate commerce potentially subject to such taxes.

I

The Decision Below Is In Irreconcilable Conflict With The Decision Of This Court In *Norton Co. v. Dep't of Revenue of Illinois*, 340 U.S. 534 (1951).

West Virginia takes the position that sales transactions consummated outside that state resulting in shipments into West Virginia are subject to taxation by West Virginia as a result of nexus which exists between other unrelated activities of Armco and West Virginia, without regard to whether the transactions in question have a nexus with the state.

The Circuit Court held that under the Due Process and Commerce Clauses some nexus between the taxing state and the activity or transaction to be taxed is a prerequisite to imposition of the gross receipts tax and that such nexus was not present with respect to sales made by the three Armco divisions involved here. This was because those divisions' only activity in West Virginia was personal solicitation of orders by

a few nonresident traveling salesmen visiting West Virginia once every two to six weeks.

The West Virginia Supreme Court rejected the Circuit Court's approach of considering the particular divisions' lack of business activity within West Virginia and held that it is sufficient that the overall activities in the state of a unitary business are substantial. Since Armco had extensive coal operations in West Virginia, albeit unrelated to the sales transactions in question except as part of Armco's unitary business, the West Virginia Supreme Court held the tax applicable, stating:

> In the present case, we believe that where a unitary business, such as Armco, has a substantial nexus in this State . . . we are not required to separate the activities of [Armco's] various divisions doing business in this State and treat them separately for purpo es of determining whether in isolation they have a sufficient connection to this State to warrant the imposition of a business and occupation tax. The taxpayer is a unitary business corporation conducting its business activity under one corporate umbrella.

App. A, *infra*, 14a-15a.

In *Norton*, which similarly involved a gross receipts tax for the privilege of engaging in specified business, this Court held that to find the required nexus one must look to the contact between the taxing state and the *transaction* it seeks to tax, not simply to the contact of the taxpayer with the state. In *Norton*, a Massachusetts manufacturer maintained a branch office and warehouse in Illinois from which it made local retail sales; Illinois buyers also placed orders directly with the main office of the manufacturer in Massachusetts, receiving direct shipment from Massachusetts. This Court affirmed the imposition of tax on the proceeds of sales from orders received or filled by the Illinois branch office, but said that the tax could not be applied to sales unrelated to the local facility. This Court held the Illinois tax invalid with respect to sales where the only

intrastate activity associated with those sales was occasional engineering and technical advice, stating:

> The only items that are so clearly interstate in character that the State could not reasonably attribute their proceeds to the local business are orders sent directly to Worcester by the customer and shipped directly to the customer from Worcester. Income from those we think was not subject to this tax.

340 U.S. at 539.

This Court's view that nexus must exist with respect to each individual activity was demonstrated by the following statement:

> But when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some Illinois sales only by showing that particular transactions are dissociated from the local business and interstate in nature.

Norton, 340 U.S. at 537. The sales made by the Armco divisions involved here could not be further "dissociated" from Armco's coal mining activities in West Virginia.

The West Virginia Supreme Court chose to disregard *Norton*, alleging a "weakening of *Norton*" by this Court's decisions in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), and *Standard Pressed Steel Co. v. Washington Dep't of Revenue*, 419 U.S. 560 (1975). In *General Motors*, however, this Court recognized the validity of the *Norton* dissociation test by stating that to avoid the Washington business and occupation tax the corporation "has the burden of showing that the operations of these divisions in the State are 'dissociated from the local business and interstate in nature' ", 377 U.S. at 441, and examined the activities of each division of the taxpayer. In *Standard Pressed Steel* only one customer (Boeing) buying one type of product (fasteners) was involved and the taxpayer's sole activity in the taxing jurisdiction was entirely devoted to those sales.

Moreover, *General Motors* and *Standard Pressed Steel* are clearly distinguishable from the case at bar. In *General Motors*, the taxpayer had a warehouse in the state from which it sold and shipped parts and accessories to dealers for each division. Each division had full-time resident employees whose activities went far beyond solicitation and had either a formal branch office or "the homes of these officials were used as corporate offices." 377 U.S. at 447. This Court sustained these activities as sufficient to support the business and occupation tax on the direct out-of-state shipment of cars, parts and accessories to dealers within the state because these sales were so intertwined with the "maze of local connections", 377 U.S. at 448, as to be incapable of being "dissociated from the local business." Thus, instead of rejecting the *Norton* dissociation test, in *General Motors* this Court simply applied the test and found that dissociation was not possible on the facts presented.

In *Standard Pressed Steel*, the State of Washington sought to impose its business and occupation tax on all sales made by Standard Steel to the Boeing Company. Standard Steel had its headquarters in Pennsylvania where it received direct orders from Boeing which it filled and shipped directly to Boeing. The taxpayer's connection with Washington was an employee who worked full time in Washington and whose job it was to consult with Boeing regarding its product needs and to make arrangements for periodic visits to Boeing by Standard Steel's out-of-state engineers. This Court held that the maintenance of an employee within the state full time in a position substantially important to the sales to Boeing brought such sales within the scope of Washington's taxing authority.

In the case at bar, the conduct of mining operations in West Virginia by Armco is wholly unrelated to the sales of steel products to customers located in that state—to a degree, in fact, which is much greater than the dissociation favored in *Norton*. Armco does not maintain any employees in West Virginia with duties related to the sales of steel products.

Finally, it should be noted that this Court has cited *Norton* in more recently decided state tax cases for the proposition that

the activities surrounding a particular transaction must be examined to determine if the constitutionally required nexus exists. *E.g.*, *National Geographic v. California Bd. of Equalization*, 430 U.S. 551, 560 (1977); *American Oil Co. v. Neill*, 380 U.S. 451, 458 (1965).

Because it concluded that *Norton* should not be applied to the instant case, the West Virginia Supreme Court did not pass on whether there was any nexus between West Virginia and the sales of steel products to customers located within West Virginia on which the tax was asserted. The Circuit Court, however, did test those transactions.

The Circuit Court below referred to the first of the four criteria enumerated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), for sustaining a tax against Commerce Clause challenge, *i.e.*, "the tax [must be] applied to an activity with a substantial nexus with the taxing state." The Circuit Court then correctly held that: "In this case the solicitation on a part-time basis in this state by the nonresident traveling salesmen does not constitute a 'substantial nexus.' " App. B, *infra*, 27a. As the Circuit Court below also held:

> The taxpayer in the case *sub judice* has met its burden of showing that no local presence contributes to the interstate business.

App. B, *infra*, 28a.

Even if mere solicitation were deemed to establish sufficient nexus, Armco sales which involved no solicitation in West Virginia would be exempt. The Circuit Court below found that approximately 77 percent of Armco's steel product sales to customers located in West Virginia were to three companies whose orders were solicited outside of the state. As to those sales, this case is indistinguishable from *American Oil Co. v. Neill*, 380 U.S. 451 (1965), which held that shipments into Idaho pursuant to sales orders obtained outside the state could not, under the Due Process Clause, be subjected to an Idaho excise tax even though the taxpayer had substantial local activities.

The *Norton* dissociation test should be applied in the case at bar to invalidate taxation by West Virginia of individual transactions having no substantial nexus with that state.

II

The Decision Below Is Incorrect In Holding That Nexus Established By Application Of The Unitary Business Principle Is Sufficient To Validate A Gross Receipts Tax Under The Commerce And Due Process Clauses.

The legal discussion in the West Virginia Supreme Court's opinion commences by quoting this Court's summary in *Exxon Corp.* of the requirements of due process but fails to note that in *Exxon Corp.* this Court was expressly referring only to taxes on net income. App. A, *infra*, 5a. While mentioning several pages later that *Exxon Corp.* involved "a different type of state tax", the West Virginia Supreme Court nevertheless subsequently finds "an obvious parallel between Exxon's divisional operation claim and Armco's claim presented here", and ultimately concludes that it "can see no distinction between this situation and the unitary business concept." App. A, *infra*, 10a, 11a and 15a.

The classic statement of the relevant distinction between gross receipts and net income taxes is contained in *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 328-9 (1918):

> **The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so**

> diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large.

In *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), when this Court approved the imposition of a net income tax on a corporation with exclusively interstate income, it cited *United States Glue*'s distinction between "an invalid direct levy. . . and a charge by way of net income." *Id.* at 459. The Congressional response in the Interstate Income Tax Act, 15 U.S.C. §§ 381-384, likewise dealt only with taxes on or measured by net income.

The distinction continued to be recognized in, *inter alia*, *General Motors Corp. v. Washington*, 377 U.S. 436, 440 (1964), and *Standard Pressed Steel Co. v. Dep't of Revenue of Washington*, 419 U.S. 560, 563 (1975). *See also National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977).

The cases in which this Court has recently approved application of the unitary business principle are net income tax cases: *Exxon Corp.*, *supra*; *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980); *Asarco, Inc. v. Idaho State Tax Commissioner*, 102 S. Ct. 3103 (1982); *F.W. Woolworth Co. v. Taxation and Revenue Dep't of New Mexico*, 102 S. Ct. 3128 (1982); and *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933 (1983). In each of these cases the unique difficulties of otherwise determining states' respective shares of the net income of a multi-state business is recognized as the reason for the unitary business principle. No such difficulties are presented by a gross receipts tax.

In invoking the unitary business principle to replace *Norton*, the West Virginia Supreme Court diminishes the direct relationship heretofore necessary to sustain a gross receipts tax to a mere showing that the activity to be taxed was part of a unitary

business, any facet of which had a substantial nexus with the taxing jurisdiction and received protection, opportunities and benefits for which the state could ask return. This is a startling departure from prior decisions of this Court. Moreover, while relying on the looser standards applicable to apportioned net income taxes, the West Virginia Supreme Court simultaneously rejects any need of apportionment to reflect the contribution of out-of-state activities to producing the gross receipts being taxed.

Extension of the "unitary business" principle as the Due Process and Commerce Clause standard from the apportioned net income tax area to unapportioned gross receipts taxes and other similar direct taxes is a radical and unwarranted step.

III

The Decision Below Does Not Correctly Apply The Anti-Discrimination Standard For Testing Conformity With The Commerce Clause.

The West Virginia tax on the business of selling tangible property at wholesale discriminates against interstate commerce by exempting from the tax certain sales of in-state manufacturers while not providing a similar exemption for out-of-state manufacturers. A state does not have the power to tax when the effect of the tax is to discriminate against interstate commerce. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977). Thus, a state may not tax local transactions involving products manufactured or business operations performed in any other state at a higher rate than similar local activities with no out-of-state components. Because the effect of the West Virginia business and occupation tax is to impose a higher rate of tax on wholesale sales of goods manufactured without the state, that tax violates the Commerce Clause.

The West Virginia Supreme Court erroneously rejected this conclusion on two grounds: first, the same exemption is

available to an out-of-state corporation if it chooses to manufacture its goods within West Virginia, and second, in-state manufacturers are subject to a business and occupation tax on manufacturing which is levied at a rate which exceeds the tax on wholesale sales.

The observation of the court below that Armco could avail itself of the same exemption by both manufacturing and selling within West Virginia does not address the issue of whether the exemption causes the tax to discriminate against interstate commerce because the court's suggestion for avoiding the tax reduces the commerce engaged in from interstate to purely intrastate. The decision below holds, in effect, that a tax on interstate commerce which is not applied to intrastate commerce is permissible where those engaged in the interstate commerce theoretically could avoid the tax by ceasing interstate commerce and engaging exclusively in intrastate commerce. The hypothetical remedy for Armco posed by the court below clarifies the discrimination against interstate commerce instead of exonerating the state scheme. Although the court's first point might be valid if the defect complained of were discrimination against Armco itself, it is inapplicable to Armco's argument of discrimination against interstate commerce.

The court's second argument, that no discrimination exists because in-state manufacturers are taxed on their manufacturing activity at a higher rate is also erroneous. Even when analyzed in conjunction with the tax on manufacturing activities, it can be seen that the state scheme for taxing sales imposes a greater, and therefore impermissible, burden on interstate sales activities. Consider commerce involving West Virginia and a hypothetical second state with a business and occupation tax identical to that of West Virginia.[2] The activi-

---

2 This method of analysis, *i.e.*, reference to the overall result if every jurisdiction applied the same tax laws, was very recently approved by this Court in *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933, 2942 (1983).

ties of manufacturing goods and selling them at wholesale, when both are performed in either one of the two states (*i.e.*, wholly intrastate commerce), would subject the taxpayer to tax on the manufacturing activity, but not on the wholesale activity. The taxpayer who manufactures identical goods in one of the states and sells them at wholesale in the other, however, incurs liability both for tax on the manufacturing activity in the first state (in the same amount as the intrastate taxpayer) and for tax on the sales in the second state. Thus, the interstate taxpayer suffers a total business and occupation tax liability which exceeds the tax imposed on the intrastate taxpayer by an amount equal to the tax on wholesale sales.

Clearly, the West Virginia business and occupation tax scheme works discriminatorily to impose a burden on interstate commerce which is not borne by intrastate commerce. Accordingly, the West Virginia business and occupation tax on sales violates the Commerce Clause of the United States Constitution.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Dated: August 23, 1983

Respectfully Submitted,

RICHARD R. DAILEY
Counsel of Record
EDWARD H. HEIN
MICHAEL J. RUFKAHR
Attorneys for Appellant
Armco Inc.

Of Counsel

BREED, ABBOTT & MORGAN

APPENDICES

Appendix A

OPINION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Justice McHugh, deeming himself disqualified, did not participate in the consideration or decision of this case.

No. 15437

ARMCO, INC., ETC.

—v.—

DAVID C. HARDESTY, JR.,
STATE TAX COMMR., ETC.

Kanawha County — Reversed and Remanded.

MILLER, *Justice*

1. For the purposes of the Due Process and the Commerce Clauses of the United States Constitution, where a business has been found to have a substantial nexus with this State, and where there is a rational relationship between the tax imposed on its business activity within this State, and the protection, opportunities, and benefits afforded by the State, the tax will be upheld unless it is shown that the tax discriminates against interstate commerce or is not fairly apportioned.

2. Where a unitary business has a substantial nexus in this State through its qualifying to do business in this State, and engaging in operations such as coal mining and sales of metal products, we are not required to separate the activities of its

various divisions doing business in this State and treat them separately for purposes of determining whether in isolation they have a sufficient connection to this State to warrant imposition of a business and occupation tax.

3. Whether there is a rational relationship or fair apportionment of a tax to the local services and benefits afforded a taxpayer must also be answered by viewing the taxpayer's total activities in this State. West Virginia's business and occupation tax is composed of a number of individual taxes tied to specific business activities occurring within this State. Thus, the business and occupation tax bears a relationship or apportionment to business activity in this State because the tax is imposed based on the value of the business activity occurring within the State.

4. The Commerce Clause of the United States Constitution does not dictate an iron rule of equality between taxes laid by a State on different types of business activity.

5. Section 1 of Article X of the West Virginia Constitution does not require that the same rate of business and occupation tax be applied to all classes of business activity and callings to which the tax is applied. The Legislature may prescribe different rates for different businesses and callings, but the rate of taxation must be uniform and equal within each classification.

MILLER, *Justice*:

This is an appeal by the State Tax Commissioner from an order of the Circuit Court of Kanawha County which set aside a business and occupation tax deficiency assessment against Armco, Inc. The circuit court concluded that the wholesale classification provisions of the business and occupation tax law (W. Va. Code, 11-13-1, *et seq.*) did not apply to the operations of certain divisions of Armco, Inc. The circuit court's conclusion was based principally on its view that these divisions did not have a sufficient business nexus with the State of West

Virginia to support the imposition of the tax. On appeal the State Tax Commissioner claims that the circuit court erred in failing to find a sufficient nexus. We agree, and we reverse the decision of the Circuit Court of Kanawha County.

Armco, Inc., is an Ohio corporation qualified to hold property and do business as a foreign corporation in West Virginia. The corporation is divided into a number of divisions, four of which are relevant to the proceedings now before us: the Mining Division, the Steel Group, the Union Wire Rope Group, and the Metal Products Division. The proceeding out of which the present appeal arises involved the operations of the four divisions between January 1, 1970, and December 31, 1975.

During the period in question the Mining Division was extensively involved in mining, cleaning, and selling coal in West Virginia. The record indicates that during this period the company operated at least four mines which produced substantial amounts of coal. For instance, there is evidence that in the year 1974 alone, Armco's Number 7 Mine produced 545,288 tons of clean coal; Mine 11E produced 48,069 tons; Mine Number 8 produced 686,728 tons; and Mine Number 9 produced 257,815 tons. In the proceedings below the company did not challenge the fact that through its mining operations it had a business nexus with West Virginia.

The Steel Group of Armco produced certain steel products at nine plants located in seven states. There were no manufacturing facilities in West Virginia. This Group had no sales offices in West Virginia, but sold its products through its Cincinnati, Ohio office and its Pittsburgh, Pennsylvania office. There was evidence that the Cincinnati and Pittsburgh offices each sent two salesmen into West Virginia once every four to six weeks. The salesmen were not residents of West Virginia and had specific territories which included portions of other states. There was also evidence that one salesman went to Wheeling from Pittsburgh twice a month.

The salesmen were not authorized to accept or reject orders from West Virginia customers. Orders were forwarded to the Group's out-of-state offices where they were accepted or re-

jected. Goods ordered were shipped from out-of-state facilities by common carrier, and title passed to the common carrier at the out-of-state pick-up points. Follow-up calls by the salesmen were made to check customer satisfaction, and occasionally representatives of the Steel Group were called upon to investigate customer complaints and perform service work.

The Union Wire Rope Group's activities were similar to those of the Steel Division. It had a mill in Kansas City and warehouses in Ashland, Kentucky, and Pittsburgh, Pennsylvania. It maintained no inventory in West Virginia. It had no resident service or sales representatives in West Virginia, and it maintained no offices in the State. It had three salesmen—one each from Ashland, Kentucky, Pittsburgh, Pennsylvania, and Greensboro, North Carolina—who visited West Virginia once or twice a month. They took all orders subject to acceptance at Middletown, Ohio. The Group shipped goods into West Virginia in the same way as the Steel Division. The Union Wire Rope Group was not authorized to sell the Steel Division's products, and the Steel Division did not handle the Wire Rope Group's products.

Armco's Metal Products Division which produced and sold a number of construction products maintained an office in South Charleston, West Virginia. During the 1970-75 period two sales engineers and a secretary worked out of the office. The office managed the sales of all the Metal Products Division's products except metal buildings. The Division's metal buildings were sold by franchisees who were West Virginia residents operating in this State. They had agreements authorizing them to utilize the corporate name and trademarks, as well as corporate advertisements. Armco shared advertising expenses with its franchisees in order to promote sales.

On appeal Armco contends that because of the Due Process and the Commerce Clauses of the United States Constitution, the business and occupation tax cannot be imposed on the activities of the Steel Group, the Union Wire Rope Group, or on the sales of metal buildings by its Metal Products Division. Specifically, Armco claims that the operations of these divisions must be viewed separately, and, when so viewed, they do

not have a substantial business nexus with West Virginia, and that the taxes imposed upon these divisions are not fairly apportioned.

I.

The Due Process Clause and the Commerce Clause of the Constitution of the United States contain standards that must be met in order to sustain state taxation of a business which conducts both local and interstate business. In *Exxon Corp. v. Wisconsin Dept. of Revenue,* 447 U.S. 207, 219-20, 65 L.Ed.2d 66, 79, 100 S.Ct. 2109, 2118 (1980), the Supreme Court of the United States summarized the requirements of due process:

> "The Due Process Clause of the Fourteenth Amendment imposes two requirements for such state taxation: a 'minimal connection' or 'nexus' between the interstate activities and the taxing State, and 'a rational relationship between the income attributed to the State and the intrastate values of the enterprise.' *Mobil Oil Corp. v. Commissioner of Taxes,* [445 U.S. 425], at 436, 437, [63 L.Ed.2d 510, 520, 100 S.Ct. 1223, 1231]. See *Moorman Mfg. Co. v. Bair,* [437 U.S. 267], at 272-273, [57 L.Ed.2d 197, 204, 98 S.Ct. 2340, 2344]; *National Bellas Hess, Inc. v. Department of Revenue,* 386 U.S. 753, 756, [18 L.Ed.2d 505, 508, 87 S.Ct. 1389, 1391] (1967); *Norfolk & Western R.Co. v. State Tax Comm'n,* 390 U.S. 317, 325, [19 L.Ed.2d 1201, 1207, 88 S.Ct. 995, 1000] (1968)."

The requirements of the Commerce Clause overlap somewhat on the Due Process standards as illustrated by the Commerce Clause test given in *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.,* 435 U.S. 734, 750, 55 L.Ed.2d 682, 697, 98 S.Ct. 1388, 1399 (1978):

> "The Court repeatedly has sustained taxes that are applied to activity with a substantial nexus with the State,

> that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State. E.g., *General Motors Corp. v. Washington*, 377 U.S. 436 [12 L.Ed.2d 430, 84 S.Ct. 1564] (1964); *Northwestern Cement Co. v. Minnesota*, 358 U.S. 450 [3 L.Ed.2d 421, 79 S.Ct. 357, 67 A.L.R.2d 1292] (1959); *Memphis Gas Co. v. Stone*, 335 U.S. 80 [92 L.Ed. 1832, 68 S.Ct. 1475] (1948); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 [85 L.Ed. 267, 61 S.Ct. 246, 130 A.L.R. 1229] (1940); *see Complete Auto Transit, Inc. v. Brady*, 430 U.S., at 279, and n. 8 [51 L.Ed.2d 326, 97 S.Ct. 1076]."

It would appear that the Due Process "minimal connection or nexus" is related to the Commerce Clause "activity with a substantial nexus with the State." Moreover, the Due Process requirement of a "rational relationship between the income attributed to the State and the intrastate values of the enterprise" is not incompatible with the Commerce Clause standard that the tax "must be fairly related to the service provided by the State." This view has some recent support from the Supreme Court itself, as illustrated by *Asarco Inc. v. Idaho State Tax Comm'n*, ___ U.S. ___, ___, 73 L.Ed.2d 787, 794, 102 S.Ct. 3103, 3109 (1982), where the Court, in a Due Process analysis, defined the "rational relationship" Due Process test in terms that are almost identical to the Commerce Clause requirement of "fairly related to the services provided:"

> "The broad inquiry in a case such as this, therefore, is 'whether the taxing power exerted by the state bears fiscal relation to protection, opportunities, and benefits given by the state. That simple but controlling question is whether the state has given anything for which it can ask return.' *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 [85 L.Ed. 267, 270-71, 61 S.Ct. 246, 250] (1940)."

The dissent in *Asarco* candidly recognized that decisions under both the Commerce Clause and the Due Process Clause relied on a similar analysis:

> "Our cases establish that analysis of the validity of state taxation under the Commerce Clause is similar to analysis under the Due Process Clause. The test under the Commerce Clause is whether the tax 'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.' *Mobil Oil Corp. v. Commissioner of Taxes, supra,* at 443, 63 L.Ed.2d 510, 100 S.Ct. 1223 (quoting *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279, 51 L.Ed. 2d 326, 97 S.Ct. 1076 (1977)." ___ U.S. at ___, n. 14, 73 L.Ed.2d at 816, n. 14, 102 S.Ct. at 3126-27, n. 14.

See also F. W. Woolworth Co. v. Taxation and Revenue Department of New Mexico, ___ U.S. ___, 73 L.Ed.2d 819, 102 S.Ct. 3128 (1982).

We conceive that for the purposes of the Due Process and Commerce Clauses of the United States Constitution, where a business has been found to have a substantial nexus with this State, and where there is a rational relationship between the tax imposed on its business activity within this State, and the protection, opportunities, and benefits afforded by the State, the tax will be upheld unless it is shown that the tax discriminates against interstate commerce or is not fairly apportioned.

The critical issue in the present case centers on Armco's claim that each of its separate divisions must be treated as a separate entity in analyzing whether the division is doing sufficient business to establish a nexus with this State to be taxed. Additionally, it contends that there is no rational relationship between the amount of tax imposed on the particular division and the protection, opportunities, and benefits the division obtains in return from this State.

Armco relies on *Norton Co. v. Department of Revenue of Illinois,* 340 U.S. 534, 95 L.Ed. 517, 71 S.Ct. 377 (1951), where the taxpayer contested an Illinois tax imposed on the selling of tangible property. That tax was measured by the gross receipts from the taxpayer's sales. The taxpayer's facility was in Massachusetts, but it maintained a sales office and warehouse in

Chicago from which it made sales throughout Illinois. Its Illinois sales could be divided into three categories: (1) direct purchases at the Chicago office; (2) mail orders filled in Massachusetts and sent to the Chicago office for pickup or further re-routing to Illinois customers; and (3) mail orders filled in Massachusetts and shipped directly to Illinois customers.

The Supreme Court held that the third category of activity was purely interstate because the record did not demonstrate that there was any local activity which could be related to the interstate mail order sales. The dissent in *Norton,* lead by Justice Clark, argued that there were local activities which related to the interstate sales. The dissent pointed out that the Chicago office offered service and technical advice on the company's products as well as handled customer complaints. Moreover, its total activities were sufficient to enable Illinois courts to obtain jurisdiction over the company and, therefore, all of these factors would permit taxation of the mail order sales.

Significantly, Justice Clark wrote for the majority in *General Motors Corp. v. Washington,* 377 U.S. 436, 12 L.Ed.2d 430, 84 S.Ct. 1564 (1964), where the issue was whether the State of Washington could impose its business and occupation tax measured by the gross wholesale prices of motor vehicles, parts and accessories shipped into the State. It was admitted that the vehicles, parts and accessories were shipped directly to dealers who had direct ordered the items from out-of-state manufacturing facilities.

The business connection of General Motors with Washington was that it had a warehouse in the state where it sold certain automobile parts. On these sales it paid a business and occupation tax. General Motors also had a resident district sales manager who worked out of his home and called on local dealers. There were service representatives who lived within the state and dealt with the dealers in regard to car servicing problems. The zone manager lived out of state but made trips into the state. In sustaining these activities as being sufficient to support the business and occupation tax on the direct

out-of-state shipment of cars, parts and accessories to dealers within the state, the Supreme Court stated:

> "In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded." 377 U.S. at 441, 12 L.Ed.2d 435, 84 S.Ct. at 1568.

It is apparent that General Motors contended that there was insufficient business connections in Washington as to four of its divisions: Chevrolet, Pontiac, Oldsmobile and General Motors Parts, as the Court made this comment:

> "Here it is admitted that General Motors has entered the State and engaged in activities therein. In fact, General Motors voluntarily pays considerable taxes on its Washington operations but contests the validity of the tax levy on four of its Divisions, Chevrolet, Pontiac, Oldsmobile and General Motors Parts." 377 U.S. at 441, 12 L.Ed.2d at 435, 84 S.Ct. at 1568.

The Court refused to narrow its inquiry to the precise business activity done by each division, but instead looked to the total business activity done by the corporation within the state.

Further weakening of *Norton*[1] is evident in *Standard Pressed Steel Co. v. Washington Department of Revenue,* 419 U.S. 560, 42 L.Ed.2d 719, 95 S.Ct. 706 (1975), where the State of Washington again sought to impose its business and occupation tax on all sales made by Standard Steel to the Boeing

---

1 There can be no doubt that the four dissenting judges in *General Motors Corp. v. Washington, supra,* viewed the case as a significant departure from the *Norton* standard as they stated:

> "[T]he Court holds that the activities of the sales representatives constitute 'an in-state activity' forming 'a sufficient local incident upon which a tax may be based.' *Ante,* at 438. This decision departs from *Norton Co. v. Department of Revenue,* 340 U.S. 534 [95 L.Ed. 517, 71 S.Ct. 377], and adopts a test there rejected." 377 U.S. at 454, 12 L.Ed.2d at 442, 84 S.Ct. at 1574.

Company. Standard Steel had its headquarters in Pennsylvania where it received direct orders from Boeing which it filled and shipped directly to Boeing. Its only connection with Washington was an employee who lived in the state and operated out of his home. His job was to contact Boeing regarding its product needs and to make arrangements for periodic visits to Boeing by Standard Steel's out-of-state engineers. The taxpayer's claim that its nexus was too tenuous to support the tax was rejected by a unanimous court in this fashion:

> "We think the question in the context of the present case verges on the frivolous. For appellant's employee, Martinson, with a full-time job within the State, made possible the realization and continuance of valuable contractual relations between appellant and Boeing." 419 U.S. at 562, 42 L.Ed.2d at 722, 95 S.Ct. at 708.

Of some bearing, although involving a different type of state tax, is *Exxon Corp. v. Wisconsin Dept. of Revenue, supra,* where the question involved the validity, under both the Due Process and the Commerce Clauses, of the state's apportioned business income tax. Exxon, which was admittedly a vertically integrated petroleum company, had devised an internal accounting system which separated its operations into three main units: (1) exploration and production; (2) refining; and, (3) marketing. There was no dispute that its only business activity in Wisconsin fell into the third category—marketing. Exxon contended that Wisconsin could not utilize all of its business income in apportioning the state income tax but was restricted to taxing its marketing income. However, a unanimous court rejected this contention stating:

> "In order to exclude certain income from the apportionment formula, the company must prove that 'the income was earned in the course of activities unrelated to the sale of petroleum products in that State.' *Mobil Oil Corp. v. Commissioner of Taxes, supra,* at 439 [63 L.Ed.2d 510, 522, 100 S.Ct. 1223, 1232]. The court looks to the 'underlying economic realities of a unitary business,' and

> the income must derive from 'unrelated business activity' which constitutes a 'discrete business enterprise,' 455 U.S., at 441, 442, 439, 100 S.Ct., at 1233, 1234, 1232." 447 U.S. at 223-24, 65 L.Ed.2d at 81, 100 S.Ct. at 2120.

The Court went on to hold that because there were many facts showing a unitary business, including a central board of directors and operating officers as well as operational interchanges between the three units, there was no unrelated business activity to require removal of the income from the other divisions.[2] There is an obvious parallel between Exxon's divisional operation claim and Armco's claim presented here that it is not subject to the business and occupation tax measured on its sales to State customers because a particular division in isolation has a limited business connection in this State.[3]

---

2 The Court in *Exxon* mentioned these operational interrelationships:

> "As has already been noted, Exxon's Coordination and Services Management provided many essential corporate services for the entire company, including the coordination of the refining and other operational functions 'to obtain an optimum short range operating program.' App. 189. Many of the items sold by appellant in Wisconsin were obtained through a centralized purchasing office in Houston whose obvious purpose was to increase overall corporate profits through bulk purchases and efficient allocation of supplies among retailers. Cf. *Butler Bros. v. McColgan*, 315 U.S., at 508 [86 L.Ed. 991, 996, 62 S.Ct. 701, 705] ('the operation of the central buying division alone demonstrates that functionally the various branches are closely integrated'). Even the gasoline sold in Wisconsin was available only because of an exchange agreement with another company arranged by the Supply Department, part of Coordination and Services Management, and the Refining Department. Similarly, sales were facilitated through the use of a uniform credit card system, uniform packaging, brand names, and promotional displays, all run from the national headquarters." 447 U.S. at 224, 65 L.Ed.2d at 82, 100 S.Ct. at 2121.

3 We do not believe that either *Asarco, Inc. v. Idaho State Tax Commissioner, supra*, or *F. W. Woolworth Co. v. Taxation and Revenue Department of New Mexico, supra*, represents a retreat from the principles in *Exxon Corp. v. Wisconsin Dept. of Revenue, supra*. *Asarco, supra*, was an attempt to include within the taxable income of a non-resident corporation dividends, interest and capital gains it received from subsidiary corporations

Our cases involving our business and occupation tax[4] have responded to these United States Supreme Court opinions and have taken note of what is clearly a trend on the part of the Supreme Court to permit the states to exact a fair tax on interstate enterprises. The Supreme Court's position is summarized in this statement from *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. at 748, 55 L.Ed.2d at 695, 98 S.Ct. at 1398 (1978):

> "*Complete Auto*, recognized that a State has a significant interest in exacting from interstate commerce its fair share of the cost of state government. . . . All tax burdens do not impermissibly impede interstate commerce." (Citations omitted)[5]

---

having no contact with the taxing state. *Woolworth* involved dividend income from a foreign (overseas) subsidiary. In each case, the Supreme Court held it could not be done because of the lack of a unitary business principle between the parent and its subsidiaries. The Court in *Asarco, supra*, emphasized the unitary business principle relied on in *Exxon* was lacking and stated in note 14:

> "The unitary business principle applied in *Mobil* and *Exxon* is not new. It has been a familiar concept in our tax cases for over 60 years. *See United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 473 n. 25, 474, n. 26, 54 L.Ed.2d 682, 98 S.Ct. 799 (1978); *General Motors Corp. v. Washington*, 377 U.S. 436, 439, 12 L.Ed.2d 430, 84 S.Ct. 1564 (1964)." ___ U.S. at ___, 73 L.Ed.2d at 797, n. 14, 102 S.Ct. at 3111, n. 14. (Other citations omitted)

Significantly, *General Motors Corp. v. Washington, supra*, as we have previously discussed, involved a business and occupation tax.

4 For a resume of recent State tax decisions, *see* Lathrop, *Due Process And Commerce Clause Considerations Under The West Virginia Business and Occupation And Carrier Income Taxes—J.C. Penney v. Milacron*, 85 W. Va. L. Rev. 307 (1983).

5 *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977), overruled *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 95 L.Ed. 573, 71 S.Ct. 508 (1951), which had held that a state tax on the privilege of engaging in an activity in the State could not be applied to an activity that was part of interstate commerce. In lieu thereof, *Complete Auto* substituted a functional economic test that relates to

In *J. C. Penney Co., Inc. v. Hardesty*, ___ W. Va. ___, 264 S.E.2d 604 (1979), we sustained our business and occupation tax on the taxpayer's direct mail orders and its finance charges. The taxpayer conceded that it had a substantial business nexus with this State through the operation of a number of retail outlets but contended that its business activities in regard to direct mail orders and finance charges had no independent intrastate connection. We rejected this contention stating:

> "Like the manufacturer in *Standard Pressed Steel, supra* the activities of the taxpayer are greatly facilitated by its overall operations in West Virginia; there are sufficient contacts with the State to support a tax nexus." ___ W. Va. at ___, 264 S.E.2d at 610.

Of even more relevance is *Cincinnati Milacron Company v. Hardesty*, ___ W. Va. ___, 290 S.E.2d 902 (1982), where we found the taxpayer liable for a business and occupation tax on sales made by two of its operational divisions to local customers based on the fact that the company had qualified to do business in this State and had a sales engineer who spent forty-five percent of his time soliciting orders in this State. Additionally, the taxpayer would send service representatives into this State to handle particular service problems with the company's products.

We dealt with a franchise operation in *Virginia Foods of Bluefield, Virginia, Inc. v. Dailey*, ___ W. Va. ___, 239

---

the economic activity of the business within the State and if the tax is fairly related to the benefits provided by the State. Most commentators appear to agree that the recent United States Supreme Court cases have relaxed Due Process Clause and Commerce Clause restrictions on state taxation of interstate business. *E.g.*, Hellerstein, *State Income Taxation of Multijurisdictional Corporations: Reflections on Mobil, Exxon and H.R. 5076*, 79 Mich. L. Rev. 113 (1980); Simes, *The Concept of Nexus and State Use and Unapportioned Gross Receipt Taxes*, 73 Nw. U. L. Rev. 112 (1978); Comment, *State Taxation of Interstate Business: An End to the Privilege Tax Immunity*, 29 U. Fla. L. Rev. 752 (1977); Note, *State Taxation on the Privilege of Doing Interstate Business: "Complete Auto Transit, Inc. v. Brady"*, 19 B.C.L. Rev. 312 (1978).

S.E.2d 770 (1977), where a Virginia food wholesaler was taxed under our business and occupation tax on the sales made in this State. It had three sales persons who were non-residents but who solicited periodically in West Virginia. Additionally, the taxpayer had two sales representatives one of whom worked full-time in this State soliciting sales of non-food items. The taxpayer also provided certain advisory services under its franchise. Based on these facts, we upheld the imposition of the tax stating in Syllabus Point 2:

> "A foreign corporation owning no property and having no place of business in this state, which engages in substantial business activities in this state which are essential to the establishment and maintenance of sales and which make possible the continuance of valuable contractual relationships is subject to this state's Business and Occupation Tax consistent with the Commerce Clause."

In *Western Maryland Railway Co. v. Hardesty*, ____ W. Va. ____, 282 S.E.2d 240, 244 (1981), in speaking of the nexus issue, we referred to *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 51 L.Ed.2d 631, 97 S.Ct. 1386 (1977), and stated:

> "It is clear that, when a direct relationship can be demonstrated between the tax and the cost to the State of the benefits and protections it affords, there is a sufficient nexus for taxation, *see id.* at 558, 97 S.Ct. at 1391, but the opposite is not true, i.e., nexus may exist even if the in-state activities are not shown to cost the State as much as the amount of the taxes. Neither is it necessary for there to be a nexus between the particular in-state activities of the taxpayer and the activity sought to be taxed. *Id.* We conclude that purposive, revenue generating activities in the State are sufficient to render a person liable for taxes."

In the present case, we believe that where a unitary business, such as Armco, has a substantial nexus in this State through its

qualifying to do business in this State, and engaging in operations such as coal mining and sales of metal products, we are not required to separate the activities of its various divisions doing business in this State and treat them separately for purposes of determining whether in isolation they have a sufficient connection to this State to warrant the imposition of a business and occupation tax. The taxpayer is a unitary business corporation conducting its business activity under one corporate umbrella. We can see no distinction between this situation and the unitary business concept used in *General Motors Corp. v. Washington, supra*, or *Exxon Corp. v. Wisconsin Dept. of Revenue, supra*.

II.

The question of whether there is a rational relationship or fair apportionment of a tax to the local services and benefits afforded a taxpayer must also be answered by viewing the taxpayer's total activities in this State. It must be kept in mind that our business and occupation tax is composed of a number of individual taxes tied to specific business activities occurring within this State.[6] Thus, the business and occupation tax bears a fair relationship or apportionment to business activity in this State because the tax is imposed based on the value of the business activity occurring within the State. *See Virginia Foods of Bluefield, Virginia, Inc. v. Dailey, supra*. As earlier pointed out, the question of proportionality is also viewed from the prospective [sic] of the services and benefits rendered by the State to all of the activities of the taxpayer occurring within the State as illustrated by this quotation from *General Motors Corp. v. Washington*, 377 U.S. at 441, 12 L.Ed.2d at 435, 84 S.Ct. at 1568:

6 "W. Va. Code, 11-13-2, *et seq.*, imposes a business and occupation tax on the following activities: severance of coal and other natural resources; manufacturing; selling tangible property; public service or utility business; contracting; operating amusements; service business not otherwise taxed; furnishing property for hire; small loan and industrial loan business; banking and other financial business."

> "[T]he question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded."

That this test has continuing validity is amply demonstrated by *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626-27, 69 L.Ed.2d 884, 900, 101 S.Ct. 2946, 2958-59 (1981), where the Court in sustaining Montana's coal severance tax, which could equal thirty percent of the contract sales price, stated:

> "The 'operating incidence' of the tax, see *General Motors Corp. v. Washington*, 377 U.S., at 440-441 [12 L.Ed.2d 430, 435, 84 S.Ct. 1564, 1568] is on the mining of coal within Montana. Because it is measured as a percentage of the value of the coal taken, the Montana tax is in 'proper proportion' to appellants' activities within the State and, therefore, to their 'consequent enjoyment of the opportunities and protections which the State has afforded' in connection with those activities. *Id.*, at 441 [12 L.Ed.2d 430, 435, 84 S.Ct. 1564, 1568]. Cf. *Nippert v. Richmond*, 327 U.S., at 427 [90 L.Ed. 760, 66 S.Ct. 586, 162 A.L.R. 844].
>
> "When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of 'police and fire protection, the benefit of a trained work force, and "the advantages of a civilized society." ' *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S., at 228 [65 L.Ed.2d 66, 84, 100 S.Ct. 2109, 2123], quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S., at 445 [60 L.Ed.2d 336, 345, 99 S.Ct. 1813, 1819-20]."

Moreover, in *Department of Revenue of Washington v. Association of Washington Stevedoring Cos., supra*, where the Supreme Court sustained the state's business and occupation tax on Stevedoring's activity and overruled two prior cases which had invalidated such a tax, the Court speaking of apportionment said:

> "When a general business tax levies only on the value of services performed within the State, the tax is properly apportioned and multiple burdens logically cannot occur." 435 U.S. at 746-47, 55 L.Ed.2d at 695, 98 S.Ct. at 1397.

Of some interest is *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 63 L.Ed.2d 510, 100 S.Ct. 1223 (1980), where Mobil challenged Vermont's right to include in its apportioned income tax formula dividend income from its foreign subsidiaries and affiliates. It contended there was no fair apportionment since none of the foreign corporations had any contact with Vermont. The Court found that under the unitary business concept the general corporation did business in the state and stated:

> "Mobil's business entails numerous 'taxable events' that occur outside Vermont. That fact alone does not prevent the State from including income earned from those events in the preapportionment tax base.
>
> ". . . One must look principally at the underlying activity, not at the form of investment, to determine the propriety of apportionability.
>
> ". . . Had appellant chosen to operate its foreign subsidiaries as separate divisions of a legally as well as a functionally integrated enterprise, there is little doubt that the income derived from those divisions would meet due process requirements for apportionability. Cf. *General Motors Corp. v. Washington*, 377 U.S. 436, 441, 12 L.Ed.2d 430, 84 S.Ct. 1564 (1964)." 445 U.S. at 440-41, 63 L.Ed.2d at 523, 100 S.Ct. at

Finally, when we look to other states that utilize a business and occupation tax, we find their decisions reject the need to make proportional their business and occupation tax because some of the events occur outside of the state. For example, in *Ramsay Travel, Inc. v. Kondo*, 53 Hawaii 419, 495 P.2d 1172 (1972), travel agents operating in Hawaii were taxed on income derived from commissions on ticket sales for transportation, lodging and sightseeing tours which activities occurred in other

states and foreign countries. The taxpayer contended that the tax should be apportioned because most of the services that generated revenues upon which the tax was levied were performed outside Hawaii. In rejecting this contention, the court stated:

> "[T]hey [taxpayers] would have to show that the state has failed to exert its power of taxation in proper proportion to their activities within the state and to their 'consequent enjoyment of the opportunities and protections which the state has afforded.' *General Motors Corporation v. Washington, supra*, 377 U.S. at 441, 84 S.Ct. at 1568. The taxpayers have failed to make any such showing." 53 Hawaii at 425, 495 P.2d at 1177.

The same result was reached in *McKinnis Travel Service, Inc. v. State*, 78 Wash.2d 229, 472 P.2d 392 (1970), and *Pan American Airways, Inc. v. Duly Auth. Gov. of Virgin Islands*, 459 F.2d 387 (3d Cir. 1972).

The issue of taxation of the income of an out-of-state lessor derived from the leasing of television and film rights to local television stations was involved in *Matter of Heftel Broadcasting Honolulu, Inc.*, 57 Hawaii 175, 554 P.2d 242 (1976), *cert. denied*, 429 U.S. 1073, 50 L.Ed.2d 791, 97 S.Ct. 811 (1977). The taxpayer asserted that all of the products covered by the license agreement were made out of state. The court however found that the license agreement gave the out-of-state lessor local dominion over the telecast and this provided a sufficient nexus to permit the entire revenue from the license agreement to be subject to Hawaii's business and occupation tax. *See also Matter of Grayco Land Escrow Ltd.*, 57 Hawaii 436, 559 P.2d 264 (1977); *Collector of Revenue v. Wells Fargo Leasing Corp.*, 393 So.2d 1244 (La. 1981).

It is obvious from these decisions that a state tax cannot be defeated on Due Process Clause or Commerce Clause grounds merely because the value of out-of-state activity as it relates to the subject of the tax, whether the subject be products or services, is greater than the value of in-state activity. There is also the need to consider the protection, benefit, and oppor-

tunities afforded by the state in this overall equation relating to proportionality. Certainly, when Armco's total business activity is viewed in this State, it enjoys numerous benefits and protections afforded by the State, including fire and police protection and a host of social legislation.

III.

Armco claims that at least as to our business and occupation tax on its wholesale activity there is actual discrimination against an out-of-state manufacturer. This argument is predicated on the language of W. Va. Code, 11-13-2,[7] which gives an exemption to those engaged in severing or extracting natural resources (W. Va. Code, 11-13-2a) and manufacturers (W. Va. Code, 11-13-2b) who sell their products to other manufacturers, wholesalers, or retailers. Such persons are not required to pay a further business and occupation tax on these sales. Consequently, Armco contends that as an out-of-state manufacturer which is selling products at wholesale in this State, it does not gain the benefit of this exemption and must pay a business and occupation tax on these sales under W. Va. Code, 11-13-2c.

The tax commissioner argues and, we believe correctly, that Armco's discrimination argument overlooks several key points. First, the same exemption is available for an out-of-state corporation which is engaged in manufacturing in this State when it sells its products at wholesale within the State. Therefore, the tax is not facially discriminatory. Second, the fact that Armco does not manufacture within this State some

---

7 The pertinent language of W. Va. Code, 11-13-2, in effect during the tax years involved in the present case, was:

> "But any person exercising any privilege taxable under sections two-a or two-b [§ 11-13-2a or 11-13-2b] of this article and engaging in the business of selling his natural resources or manufactured products to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's business shall not be required to pay the tax imposed in section two-c [§ 11-13-2c] of this article."

of the products that it sells in this State means that it is not subject to the business and occupation tax on manufacturing under W. Va. Code, 11-13-2b. This tax is imposed on an in-state manufacturer at a rate of eighty-eight one-hundredths of one percent of the gross proceeds of the sale. The tax rate on wholesale sales under W. Va. Code, 11-13-2c, is twenty-seven one-hundredths of one percent. Thus, a manufacturer in West Virginia pays a substantially higher tax than a wholesaler.

Where a state tax is claimed to be discriminatory, the United States Supreme Court has traditionally held that the particular tax must be surveyed along with other relevant provisions of the State's tax laws as summarized in *Maryland v. Louisiana*, 451 U.S. 725, 756, 68 L.Ed.2d 576, 601, 101 S.Ct. 2114, 2134 (1981):

> "A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. 'In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.' *Best & Co. v. Maxwell*, 311 U.S. 454, 455-456, 85 L.Ed. 275, 61 S.Ct. 334 (1940)."

Armco places particular emphasis on *Boston Stock Exchange v. State Tax Commissioner*, 429 U.S. 318, 50 L.Ed.2d 514, 97 S.Ct. 599 (1977), where the Supreme Court struck down New York's stock transfer tax. The effect of the tax was to permit a fifty percent reduction in the tax when the stock was sold in-state and by placing a maximum tax limit of $350 when there was an in-state sale. Certain regional out-of-state stock exchanges filed suit claiming that the tax was discriminatory since it was imposed on the transfer of the stock certificates in New York but if the actual sale were made out-of-state a higher rate was charged than if the stock was sold on the New York Stock Exchange. Thus, a competitive advantage was given to the New York Exchange in violation of the Commerce Clause.

We do not believe that *Boston Stock Exchange* is controlling as it dealt with a single tax which contained rate differentials

favoring in-state sales. Here, we are dealing with two separate taxes—the manufacturer's business and occupation tax with its exemption for in-state wholesale sales, and the business and occupation tax on wholesalers.

Our situation is more analogous to *Alaska v. Arctic Maid*, 366 U.S. 199, 6 L.Ed.2d 227, 81 S.Ct. 929 (1961), which involved a four percent tax on the value of fish caught in Alaskan waters by freezer ships and other cold storage ships and which were taken to and canned in the State of Washington. The taxpayer complained that this tax discriminated in favor of local fish processors who caught fish, and sold them on the local market and who paid a lower tax. The Court in upholding the tax stated:

> "If there is a difference between the taxes imposed on these freezer ships and the taxes imposed on their competitors, they are not so 'palpably disproportionate' (*International Harvester Co. v. Evatt*, 329 U.S. 416, 422 [91 L.Ed. 390, 395, 67 S.Ct. 444, 447] as to run afoul of the Commerce Clause. No 'iron rule of equality' between taxes laid by a State on different types of business is necessary. *Caskey Baking Co. v. Virginia*, 313 U.S. 117, 119-121 [85 L.Ed. 1223, 1226-27, 61 S.Ct. 881, 882-83]; *Morf v. Bingaman*, 298 U.S. 407, 414 [80 L.Ed. 1245, 1250, 56 S.Ct. 756, 759]; *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 546-47 [94 L.Ed. 1053, 1056-57, 70 S.Ct. 806, 809, 17 A.L.R.2d 407]." 366 U.S. at 205, 6 L.Ed.2d at 231, 81 S.Ct. at 932.

It is important to recall that Armco as an out-of-state manufacturer of products which it sells at wholesale in this State is not subject to any business and occupation tax as a manufacturer in this State. Thus, its complaint is the same that can be made by all persons who are making wholesale sales in this State, i.e. they are taxed at the wholesale rate but a manufacturer who is taxed at a much higher rate on the value of the product is exempt when he sells the same product at wholesale. We do not believe that under *Alaska v. Arctic Maid*,

supra, a showing of discrimination has been made between these two different taxes as they relate to interstate commerce.[8]

The final thrust by the taxpayer is that the exemption in W. Va. Code, 11-13-2, violates our own equal and uniform constitutional provision. W. Va. Const. art. X, sec. 1. Again, we advert to the fact that two distinct categories of business and occupation taxes are at issue: the manufacturing category which carries a much higher tax rate but permits an exemption for wholesale sales made by the manufacturer, and the wholesale tax.

Our Equal and Uniform Clause as it relates to our business and occupation tax was discussed in *United Fuel Gas Co. v. Battle*, 153 W. Va. 222, 250-51, 167 S.E.2d 890, 906 (1969), *appeal dismissed*, 396 U.S. 116, 24 L.Ed.2d 309, 90 S.Ct. 398, and this summary was given based on our earlier cases:

> "In *Arslain v. Alderson*, 126 W. Va. 880, 30 S.E.2d 533, this Court used this language: 'Unless the power of the Legislature over a subject matter is negatived by the Constitution, the Legislature has plenary power. * * *. We know of no provision of the Constitution which requires that the same rate be applied to all classes of businesses and callings on which privilege taxes are assessed. The Legislature may prescribe rates for different businesses and callings, but the rate of taxation must be uniform and equal within the classification and, if so, we see no constitutional objection thereto.' In *Appalachian Electric Power Company v. Koontz*, 138 W. Va. 84, 76 S.E.2d 863, this Court said that 'taxes need be equal and uniform only as to the same class of business,'."

It requires no great feat of imagination to conclude that the Legislature in placing the business and occupation tax on manufacturing at eighty-eight one hundredths of one percent

---

8 The taxpayer cites *Columbia Steel Co. v. Tax Commissioner*, 30 Wash.2d 658, 192 P.2d 976 (1948), which involved a rather similar business and occupation tax provision which the court held unconstitutional. This was before *Alaska v. Arctic Maid*, *supra*, which we believe to be controlling.

realized that a manufacturer would also have to dispose of the product either through wholesale or retail sales and that it would be unfair to impose an additional tax on this transaction. Therefore, it created the exemption found in W. Va. Code, 11-13-2. We believe that wholesalers who are taxed at the much lower rate of twenty-seven one hundredths of one percent cannot complain under our equal and uniform taxation principles because the Legislature has seen fit to exact a higher tax on manufacturers and exempt them from wholesale sales.[9] We, therefore, conclude that because the manufacturer's business and occupation tax and the wholesale tax involves separate classes of tax incidents that the exemption for wholesales by manufacturers does not violate the Equal and Uniform Clause of Section 1 of Article X of the West Virginia Constitution.

Under the foregoing principles, the judgment of the Circuit Court of Kanawha County is reversed and the case is remanded.

Reversed and Remanded.

---

9 Although not argued by the tax commissioner, it would seem that the Legislature also recognized that in imposing the manufacturer's tax "equal to the value of the article . . . as shown by the gross proceeds derived from the sale thereof" that the very sale that would measure the manufacturer's tax could be a wholesale sale. Consequently, it would be unfair to assess in effect a manufacturing tax on this sale and at the same time assess the manufacturer with a wholesale tax.

Appendix B

OPINION OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

THIRTEENTH JUDICIAL CIRCUIT

KANAWHA COUNTY COURTHOUSE

CHARLESTON, WEST VIRGINIA 25301

ROBERT K. SMITH
Judge

December 30, 1980

G. Thomas Battle, Esquire
Spilman, Thomas, Battle & Klostermeyer
P.O. Box 273
Charleston, West Virginia 25321

Robert Digges, Jr., Esquire
Assistant Attorney General
Tax Division
State Capitol Building No. 1
Room No. W-435
Charleston, West Virginia 25305

Re: Armco, Inc., an Ohio corporation
v.
David C. Hardesty, Jr., as
Tax Commissioner of the
State of West Virginia
Civil Action No. AP-CA-78-8

Gentlemen:

This appeal involving the business and occupation tax is before this Court pursuant to the provisions of West Virginia Code, 11-13-8 (1963), in effect at the time of the filing of this appeal. This case was reassigned to the undersigned as a result

of Judge McHugh's departure to the West Virginia Supreme Court of Appeals.

The issue in this case is whether the wholesale sales classification of the West Virginia business and occupation tax (West Virginia Code, 11-13-2, first paragraph, and -2c) is applicable to interstate sales of goods delivered by common carrier to customers in this state from out-of-state locations of certain product divisions of a foreign corporation, where the only activity by those divisions in this state is personal solicitation of product orders by nonresident traveling salesmen in the following manner: four salesmen devoting part of their time in visiting West Virginia customers on an average frequency of once every four to six weeks (Steel Group); one of three salesmen devoting part of his time in visiting West Virginia customers on an average frequency of once or twice a month (Union Wire Rope Group). About eight percent of these divisions' total sales in terms of dollars are to West Virginia customers and about 77 percent of these West Virginia sales are to three customers whose orders are solicited without this state.

The Court holds that these sales are not taxable. For these sales the taxpayer is not "engaging or continuing within this state in the business of selling". The Court recognizes that "there is no doubt that the present trend of the Supreme Court (of the United States and of the Supreme Court of Appeals of this state) is to uphold state taxes (imposed by the state of destination) against the claim that they impinge on the Commerce or Due Process Clauses." *J. C. Penney Co. v. Hardesty*, ____ W. Va. ____, ____, 264 S.E.2d 604, 616 (1979) (Miller, J., concurring). Chief Justice Neely, writing the majority opinion in the same case, struck this same chord: "(A) gross receipts tax may be levied in the state of delivery if there are sufficient contacts to create a tax nexus but cannot be levied in the state of manufacture." 264 S.E.2d at 612. Thus, quoting a law review article by a leading authority in this area, Chief Justice Neely also states the trend: " '(A)ssuming that nexus requirements have been satisifed, over the past four decades gross receipts taxes on interstate sales have generally been sustained when imposed by the state to which the goods were shipped

and prohibited when imposed by the state from which the goods were sent.' " *Id.* Utilizing this identical language the Supreme Court of Appeals of this state also noted this trend in the taxability of "inshipments" as opposed to "outshipments" in *Virginia Foods of Bluefield, Virginia, Inc. v. Dailey,* ____ W. Va. ____, ____, 239 S.E.2d 770, 777 (1977).

This trend of taxability of inshipments by the state of destination is contingent, however, upon the presence of four factors expressed in the landmark opinion of the Supreme Court of the United States, *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279, 51 L. Ed. 2d 326, 331, 97 S. Ct. 1076, ____ (1977). The Supreme Court of Appeals of this state "wholeheartedly welcome(d) *Complete Auto*'s departure from semantic formalism and its emphasis on functional economic analysis." *Chesapeake & Potomac Telephone Co. v. State Tax Department,* ____ W. Va. ____, ____, 239 S.E.2d 918, 925 (1977). For purposes of the case *sub judice* it is necessary to examine only the first factor stated in *Complete Auto Transit*'s amalgamated Due Process/Commerce Clause analysis, namely, "the tax (must be) applied to an *activity* with a *substantial* nexus with the taxing State". (underscoring added by this Court)

The Court notes that the nexus or connection must be substantial and must be between the taxing state and the activity or transaction in question, not merely between the state and the "person" of the taxpayer in the sense that there is substantial nexus between the taxing state and other, unrelated activities of the taxpayer. This is an example of "functional, economic analysis."

In this case the solicitation on a part-time basis in this state by the nonresident traveling salesmen does not constitute a "substantial nexus". In *Norton Co. v. Department of Revenue,* 340 U.S. 534, 537, 538, 95 L. Ed. 517, 520, 521, 71 S. Ct. 377, ____, ____ (1951), the Supreme Court of the United States supplied the analysis which is equally applicable to this case:

> Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office

> for acceptance, filling, and delivery back to the buyer, it is obvious that the state of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. . . .
>
> . . . .
>
> This corporation could have approached the Illinois market through solicitors only and it would have been entitled to the immunity of interstate commerce . . . .

Although exclusively interstate commerce is no longer viewed as *per se* immune from a privilege tax under the Commerce Clause (*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977), *supra*), the "substantial nexus" test of *Complete Auto Transit* still requires a "local grip on the seller" for the activity in question. *Norton* stands for the proposition that nonresident solicitation, like network television advertising or direct mail solicitation, although instrumental in obtaining product orders, is not a local incident sufficiently separable from the stream of interstate commerce. In short, in the case of nonresident solicitation, instead of there being a local incident, " '(i)nterstate commerce itself knocks on the local door.' " *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389, 393, 96 L. Ed. 436, 440, 72 S. Ct. 424, ____ (1952).

Norton also held that a tax on interstate commerce can be avoided by a "showing that particular transactions are dissociated from the local business . . . . " 340 U.S. at 537, 95 L. Ed. at 520-21, 71 S. Ct. at ____. The taxpayer in the case *sub judice* has met its burden of showing that no local presence contributes to the interstate business.

Norton remains valid even after *Complete Auto Transit. National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 560, 51 L. Ed. 2d 631, 639-40, 97 S. Ct. 1386, ____ (1977), decided less than one month after *Complete Auto Transit*, quoted *Norton* for the transactional "dissociation" principle for "direct" taxes like the business and occupation tax, thereby repudiating the applicability to such direct

taxes of the "borrowed nexus" theory held applicable to use tax collection duties of an out-of-state seller. The "borrowed nexus" theory, much like the "bundle of corporate activity" test of *General Motors Corp. v. Washington*, 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964), requires only a connection between the taxing state and the "person" of the taxpayer. It must be remembered that there was "a maze of local connections" in *General Motors*. 377 U.S. at 448, 12 L. Ed. 2d at 439, 84 S. Ct. at ____. Here, by contrast, there is only one intrastate office and it sells a line of products entirely dissimilar to the product lines of the interstate business.

Standard Pressed Steel Co. v. Washington Department of Revenue, 419 U.S. 560, 42 L. Ed. 2d 719, 95 S. Ct. 706 (1975), and *Virginia Foods of Bluefield, Virginia, Inc. v. Dailey*, ____ W. Va. ____, 239 S.E.2d 770 (1977), are distinguishable. Both of these cases speak in terms of "substantial" local or intrastate activities "which make possible the realization and continuance of valuable contractual relations" and "which are essential to the establishment and maintenance of sales" (the latter clause also contained in *General Motors, supra*). Note that there must be substantial local or intrastate activities. Here, there are none. *Norton, supra*. For example, in both *Standard Pressed Steel* and *Virginia Foods* there was at least one *resident* representative of the foreign corporation who worked full time within the taxing state, which is not the case here. *Standard Pressed Steel* discusses *Norton* approvingly. 419 U.S. at 562-63, 42 L. Ed. 2d at 722-23, 95 S. Ct. at ____.

The following description of the local activities in *Virginia Foods* indicates clearly the much greater nexus in that case than here:

(1) The taxpayer employed four full-time sales representatives, two of whom were West Virginia residents, and one of whom worked exclusively within West Virginia;

(2) The taxpayer furnished West Virginia customers with monthly catalogues and weekly revisions to facilitate customer orders;

(3) The taxpayer arranged for its representatives to periodically visit grocery stores in West Virginia, inventory the non-

food items on the West Virginia customers' shelves, and generally make out an order form for authorization by store management;

(4) The taxpayer delivered orders in its own trucks, with title and risk of loss passing upon delivery to the customer;

(5) As a distributor and franchising agent for IGA, the taxpayer solicited and obtained IGA franchise business from individual store owners in West Virginia;

(6) Once the taxpayer obtained a franchise, it consulted with the franchisee, helped the franchisee with promotional material, and assisted with general business planning under the IGA scheme;

(7) The taxpayer derived 44 percent of the gross sales in the three-state area (West Virginia, Virginia and Kentucky) from West Virginia customers as a result of the on-going, day-to-day operations in West Virginia.

The Court in *Virginia Foods* emphasized in Syllabus point 1 of its opinion that each case in this area turns upon the facts and circumstances. As demonstrated, the facts and circumstances here are materially different from those in *Virginia Foods.*

Sales of metal buildings by the subgroup of the Metal Products Division are also not taxable. Franchised dealers of the metal buildings are not even personally solicited within this state. There is no physical presence at all in West Virginia by the metal buildings subgroup of the Metal Products Division. The dealer may use the taxpayer's name and trademark, and the taxpayer shares advertising expenses with the dealer. This Court is not aware of any decision by the Supreme Court of the United States which requires only an economic exploitation of the market without any direct physical presence to uphold a direct tax. The Court is aware of one state court case involving a corporate income tax which proclaims this theory. *American Refrigerator Transit Co. v. State Tax Commission,* 238 Or. 340, ____, 395 P.2d 127, 130-31 (1964). The validity of this case in light of 15 U.S.C. § 381, as amended, may be questioned.

The Court is also aware of the holding in *Scripto, Inc. v. Carson,* 362 U.S. 207, 211, 4 L. Ed. 2d 660, 664, 80 S. Ct. 619, ____ (1960), that the label of a representative in the taxing state as an "independent" contractor, as opposed to an employee, does not exempt an out-of-state seller from the duty of collecting a use tax. *Scripto* is not persuasive precedent here, however, because it involved the collection of a use tax while a direct tax on the seller is involved here. *National Geographic, supra,* 431 U.S. at 560, 51 L. Ed. 2d at 639-40, 97 S. Ct. at ____. Moreover, the franchised dealers here are clearly acting almost entirely for their own benefit when they resell the buildings to their customers, rather than acting as the taxpayer's representative. West Virginia has jurisdiction to tax sales in this state by the franchised dealers, but not the sales by the taxpayer to the franchised dealers. That the dealers may display the taxpayer's name and trademark is *de minimus* nexus in the form of local advertising of a limited nature.

For the reasons articulated this Court reverses the tax commissioner's rulings on these issues and vacates the portion of the assessment challenged on this appeal relating to interstate sales.

An order in conformity herewith should be promptly tendered for entry. Such order should make this letter memorandum of opinion a part thereof. A copy for that purpose may be obtained from my secretary upon presentation of the order.

Very truly yours,

/s/ ROBERT K. SMITH
Robert K. Smith

RKS/dkp

ORDER OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA
At a Circuit Court for Kanawha County held at the Court House thereof on the 20th day of July 1981.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CIVIL ACTION NO. AP-CA-78-8

(Judge Smith)

ARMCO INC., an Ohio corporation,

Plaintiff,

—v.—

DAVID C. HARDESTY, JR., as Tax Commissioner of the State of West Virginia,

Defendant.

ORDER

This matter having come before the Court upon a Notice of Appeal filed by plaintiff, Armco Inc., an Ohio corporation, pursuant to the provisions of Chapter 11, Article 13, Section 8 of the Code of West Virginia of 1931, as amended, from a decision of the defendant, State Tax Commissioner of West Virginia, dated December 10, 1977, holding plaintiff liable to the State of West Virginia for business and occupation tax on the gross income from the sale of tangible property to customers in West Virginia; upon the answer of the defendant; upon the record made at an administrative hearing held on

May 23, 1977, all of which is made a part of the record herein; upon oral argument of counsel for the parties hereto; and upon written briefs filed by counsel for the respective parties.

Upon consideration whereof, the Court rendered a letter memorandum of opinion dated the 30th day of December, 1980, a copy of which is attached hereto, filed herein, and made a part of the record hereof, finding that the imposition of business and occupation tax upon the gross income of plaintiff's Steel Group, Union Wire Rope Group and metal building sales, as affirmed by the Administrative Decision made by the defendant against the plaintiff, was erroneous and should be reversed. The assessment as affirmed by Administrative Decision of the State Tax Commissioner of West Virginia is accordingly reversed as to the aforesaid transactions.

Therefore, it is ORDERED, ADJUDGED and DECREED that the Administrative Decision of the defendant Tax Commissioner dated December 10, 1977, File No. 31 020 0500 004, is hereby reversed, and the assessment of business and occupation tax against the plaintiff, Armco Inc., as affirmed by the defendant State Tax Commissioner, for the period January 1, 1970 through December 31, 1975, is hereby reversed in accordance with the findings contained in the letter memorandum of opinion of this Court dated the 30th day of December, 1980, to which findings the defendant respectfully objects and excepts.

It is FURTHER ORDERED that inasmuch as the defendant State Tax Commissioner, in determining the plaintiff's overpayment of business and occupation tax as found in defendant's Administrative Decision, reduced the amount of said overpayment by the amount of tax assessed with respect to the transactions which were the subject of this appeal, the plaintiff is entitled to the full amount of its overpayment of business and occupation tax without reduction for the tax assessed by the defendant on direct sales to West Virginia customers made by plaintiff's Steel Group, Union Wire Rope Group and the tax paid by plaintiff on metal buildings sold by the Metal Products Division subgroup.

To which ruling the defendant objects and excepts.

Dated this 20th day of July, 1981.

ENTER:

/s/ ROBERT K. SMITH
Judge of the Circuit Court of
Kanawha County, West Virginia

Presented by:

/s/ G. THOMAS BATTLE
G. Thomas Battle
Attorney for Plaintiff

Inspected by:

/s/ ROBERT DIGGES, JR.
Robert Digges, Jr.
Attorney for Defendant

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS.

I, Phyllis Jean Cole, Clerk of the Circuit Court of said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court 20th day of July 1981

/s/ PHYLLIS JEAN COLE
Clerk
Circuit Court
Kanawha County, West Virginia

Appendix C

ADMINISTRATIVE DECISION OF THE TAX DEPARTMENT OF WEST VIRGINIA

[SEAL]

STATE TAX DEPARTMENT OF WEST VIRGINIA

Charleston 25305

BEFORE THE TAX COMMISSIONER
OF THE STATE OF WEST VIRGINIA

BUSINESS TAX DIVISION

Docket # 77-105 B

File No. 31 020 0500 004

In the Matter of the Petition of

ARMCO STEEL CORPORATION
Tax Department
703 Curtis Street
Middletown, Ohio 45043

HEARING EXAMINER HOLDING HEARING:

Frank Skinner

TAXPAYER REPRESENTED BY:

G. Thomas Battle, Attorney at Law
Michael Wink, Attorney at Law
James D. Ryan, Tax Attorney, Armco Steel Corporation
Eugene J. Dabkowski, Senior Tax Administrator
Carl Obemeier, Controller
Frank Deitsch, Controller
Clayton Condry, Engineer

William Martin, Purchaser
Herbert M. Geary, District Sales Manager
Robert E. Weiford, Metal Products Division
E. D. Conaway, Chief Engineer, Robinson and Robinson, Division of NUS Corporation

TAX COMMISSIONER REPRESENTED BY:

William C. Miller II, Director, Legal Division
Michael Stajduhar, Tax Analyst
R. Michael Reed, Tax Analyst
Russell Miller, Auditing Section
H. Irvin Hoffman, Tax Examiner

DATE, TIME AND PLACE OF HEARING:

May 23, 1977, 10:00 a.m., EDT
State Tax Department
Office of Hearings and Appeals
1217 Quarrier Street
Charleston, West Virginia 25301

ADMINISTRATIVE DECISION

Pursuant to a field audit conducted by the Business Tax Division, Richard L. Dailey, then Tax Commissioner of the State of West Virginia, issued an assessment against Armco Steel Corporation (herein also referred to as the taxpayer or the petitioner) on January 5, 1977 for business and occupation tax in accordance with the provisions of Chapter 11, Article 13 of the Code of West Virginia of 1931, as amended. The assessment was for the period 1970 through 1975 for tax in the amount of $480,028.36 with penalty thereon in the amount of $237,942.54 for a total assessed tax and penalty in the amount of $717,970.90.

Taxpayer filed a timely petition for reassessment and the cause was regularly set for hearing after due notice was given to and received by the taxpayer.

The Hearing Examiner, Frank Skinner, having determined that all proper notices and documents required by law had been timely filed, called the matter on to be heard at 10:00 a.m., EDT on the 23rd day of May, 1977, in the State Tax Department at Charleston, West Virginia.

FACTS

Armco Steel Corporation is an Ohio corporation which qualified to do business in West Virginia in 1938. The taxpayer is primarily engaged in the business of manufacturing and selling steel products. To implement its primary business objective, the taxpayer also severs and extracts coal from its mines in West Virginia and purchases coal from other producers in West Virginia. Coal from both sources is prepared for use at the taxpayer's tipples located in West Virginia.

The present assessment arose as a result of a State audit of the taxpayer's books and records which indicated that the taxpayer had erroneously understated the value of its produced coal in the years 1970, 1971, 1972, 1973 and 1975, had failed to report the production value of coal consumed at its preparation plant during the entire audit period, and had failed to report the total coal production shipped to its plants in 1974. It was also found that the taxpayer had failed to report the value of coal purchased and processed at its preparation plant in the years 1970 through 1974 under the manufacturing classification. Finally, it was indicated that the taxpayer had failed to report sales of dealer aids, scrap material, materials shipped into West Virginia by its Union Wire Rope Division, and steel shipped into West Virginia.

At the hearing held on this matter, the taxpayer's counsel accepted the auditor's findings of additional tax liability under the coal production classification as reflected in the assessment for all years except 1974. In the year 1974, the petitioner's counsel contended that the audit as finally prepared reflected a value for coal produced by the taxpayer in an amount greatly exceeding the actual produced value of that coal.

Under the manufacturing classification, the taxpayer accepted the audit findings except for the value assigned to coal purchased and processed by it in 1974.

Under the wholesale sales classification, the taxpayer took no exception to the inclusion of scrap sales made by its coal mining operations nor of the sales of dealer sales aids made by its office located in South Charleston, West Virginia. However, the taxpayer did object to the inclusion in the assessment under the wholesale sales classification of the proceeds of sales by its Union Wire Rope operation and also of the proceeds from the sale of steel products shipped from points outside West Virginia to points inside West Virginia other than those sales attributable to the activities of its Metal Products Division Office located in South Charleston, West Virginia.

The dispute over the proper valuation of the taxpayer's high volatile metallurgical coal production for the year 1974 arises because the taxpayer maintains that it substantially overvalued this coal for business and occupation tax purposes on its original 1974 tax returns. The taxpayer's representative explained that this excessive valuation resulted because the taxpayer does not sell the coal produced by it in West Virginia, except for very insignificant sales to employees and a few others at a price near the taxpayer's cost. Therefore, the taxpayer has no specific sales value for its coal to report for business and occupation tax purposes. Prior to 1974, the taxpayer computed the production value of its coal production on the basis of the taxpayer's cost of producing its coal in accordance with directions received as a result of a prior State audit performed in the early 1960s. However, as the market price of coal continued to increase the taxpayer felt that the cost method of valuation was no longer sufficient. In 1974, the taxpayer decided to find a new source of figures from which to compute the production value of its coal. The taxpayer contacted its purchasing department in an attempt to find the price received by other similarly situated major coal sellers for coal of like quality purchased by the taxpayer for use in its steel operations. However, the figures received by the taxpayer actually reflected "spot market" purchase prices, which are generally much higher than purchases made under long-term contracts, and the purchase price under one long-term contract. From these sources, the taxpayer arrived at a figure of

$38.90875 per ton as the reportable production value of its coal in 1974. The taxpayer then reported and paid its business and occupation tax obligation under the production classification based on that figure.

When the present State audit was performed, the auditor found that the taxpayer had understated the production value of its coal in the years 1970 through 1973 and the year 1975. The production values in these years were adjusted upward by the auditor based on figures supplied to the taxpayer by Eastern Associated Coal Company, herein also called Eastern. Eastern mined metallurgical coal of a quality similar to the taxpayer's coal on the same lease mined by the taxpayer. The figures were derived from sales of metallurgical coal made by Eastern primarily under long-term contracts. The accuracy of these sales figures was periodically verified by an independent accounting firm employed by the lessor of the tract mined by the taxpayer and Eastern because these sales figures were used to compute additional royalties payable by the taxpayer and Eastern to the lessor. The use of these figures in place of the original cost figures by the auditor resulted in the following production value increases during the audit period: 1970—from $6.14 to $7.261 per ton; 1971—from $7.85 to $8.56 per ton; 1972—from $8.81 to $9.58 per ton; 1973—from $10.46 to $12.361 per ton, and 1975—from $24.94 to $30.10 per ton. In 1974, if the Eastern sales figure had been used to compute the taxpayer's final tax liability under the production classification the value reported by the taxpayer at $38.90875 per ton would have been reduced to $19.801 per ton. However, this downward adjustment for 1974 was not made in the final computation of the audit. Another source of high volatile metallurgical coal sales value figures introduced into the record was a long-term contract between the taxpayer as purchaser and General Coal Company entered into on April 1, 1972 under which the taxpayer purchased coal in the amount of 189,525 tons at $12.86 per ton in 1972; 180,934 tons at $14.10 per ton in 1973; 235,270 tons at $26.32 per ton in 1974; and 331,241 tons at $40.23 per ton in 1975.

Finally, the taxpayer's representative elicited testimony from E. D. Conaway, a consulting mining engineer retained by the

taxpayer to testify concerning coal valuation, that the average value for West Virginia high volatile metallurgical grade coal similar to the coal mined by the taxpayer was $26.80 per ton in 1974. This value was reported in *Coal Week News Letter*, an industry publication and it included sales under long-term contracts and on the spot market.

Under the manufacturing classification, the taxpayer again only contested that portion of the assessment attributable to an alleged overvaluation of the coal manufactured in 1974. This alleged overvaluation resulted from the use of the $38.90875 per ton figure as reported by the taxpayer as the value of the coal produced at its own mines. The taxpayer purchased 287,863 tons of this coal at an average price of $10.15 per ton. It then processed the coal at its tipple in West Virginia. The coal is then shipped to the taxpayer's out-of-state steel plants and is consumed.

Under the wholesale portion of the assessment the taxpayer objected to the inclusion of sales of products manufactured at Armco plants outside West Virginia which are ultimately delivered to in-state purchasers. These sales are handled by three separate operating groups. These groups are identified as: Steel Group (Steel); Union Wire Rope (Wire Rope); and Metal Products Division (MPD).

The MPD is divided into two sub-groups, one handling construction and drainage products exclusively and the other handling metal buildings.

The only sales related office maintained by Armco in West Virginia is the MPD construction and drainage products office located in South Charleston. Employees associated with that office are residents of West Virginia, and sales of construction and drainage products processed through that office have been reported for business and occupation tax purposes.

The metal buildings sold through MPD are handled through the Columbus office of that division. The sales of these buildings are made by the taxpayer to dealers in West Virginia. During the audit period the sales of metal buildings to dealers in West Virginia totaled $3.4 million. These dealers then resell the buildings to their customers. The taxpayer has no salesmen

who enter West Virginia to solicit orders from these dealers. Rather, the dealers enter into an "Armco Building Dealer Agreement" by which the taxpayer appoints a specific seller as a dealer of its metal buildings. Under this agreement, the dealer is allowed to purchase buildings from the taxpayer and then resell them to the general public. The dealer may also use the taxpayer's name and trademark, and the taxpayer shares advertising expenses with the dealer.

Steel and Wire Rope operate in much the same way as MPD, but without individual sub-groups. Steel maintains offices around the country with salesmen assigned specific geographic territories. The Cincinnati, Ohio office and Pittsburgh, Pennsylvania office are responsible for West Virginia, and two salesmen from Cincinnati and two from Pittsburgh visit customers in West Virginia on an average frequency of four to six weeks. None of these salesmen are residents of West Virginia, and Steel maintains no offices or resident personnel in West Virginia.

Wire Rope has offices in Ashland, Kentucky; Pittsburgh, Pennsylvania; and Greensboro, North Carolina. A representative from one of these three offices visits West Virginia customers once or twice a month. None of these representatives are residents of West Virginia, and Wire Rope maintains no offices or sales or service personnel in the State.

Neither Steel nor Wire Rope maintain any inventory of finished goods in West Virginia nor do they own or rent motor vehicles licensed in the State. Neither of these groups install, service or repair products sold by them to customers in West Virginia.

The sales representatives of Steel and Wire Rope do not have authority to accept or reject orders, and the terms and conditions of sale provide that orders are subject to acceptance at the sellers' offices which are located outside of West Virginia, with the exception of the MPD construction and drainage products office in South Charleston. Goods are delivered to customers in West Virginia by common carrier, and the conditions of sale provide that title to the products shall pass upon delivery to the carrier at point of shipment which in each instance is outside West Virginia.

ISSUES AND DETERMINATIONS

The initial issue for determination in the present matter is whether the production value of high volatile metallurgical grade coal extracted and processed by the taxpayer in West Virginia during the year 1974 as originally reported by the petitioner and accepted by the State in its audit was in fact in excess of the actual produced value of high volatile metallurgical grade coal produced in West Virginia during that year.

The taxpayer made no fairly representative sale of this coal to others during the audit period. Rather, the taxpayer consumed the coal produced at its mines in its steel making processes or at its coal preparation plants. Because of the foregoing situation, a value must be affixed to this coal without the benefit of reference to actual receipts from sales made by the taxpayer.

The State's representative contends that the production value originally reported by the petitioner on its 1974 business and occupation tax return should be accepted as the actual value of that coal because this value was based on the price paid by the taxpayer on the open market for coal in 1974. At the hearing, the taxpayer's counsel adduced evidence which indicated that the figures on which the taxpayer's 1974 production was based primarily were derived from "spot market" purchases of coal by the taxpayer in that year. It was also shown that spot market purchases, by their very nature, fluctuated widely in price and were almost always greatly in excess of prices paid for coal purchased under long-term contracts. It was also explained that coal companies sell most of their coal under long-term contracts with the remainder of their production being sold on the spot market.

Business and occupation tax regulation BOT 6.52.III.A. effective through June 30, 1974 on minimum values assignable to natural resource products states that:

> Whenever a producer or manufacturer in addition to producing or manufacturing within the state purchases products or articles of like quality and character, whether within the state or without the state, then the highest price

paid by him during the taxable year for such products or articles shall be presumed to be their minimum value, unless the market conditions under which such price was paid are known to have been abnormal and the resulting price in excess of true value.

In the present case, it is apparent that the above-stated regulation is not controlling because the taxpayer has shown that its 1974 purchases were made on the spot market and the prices paid on that market are excessive and do not represent the normal purchase prices of coal in that period. The same conclusion must be reached concerning the taxpayer's purchases of coal made during that part of 1974 coming on and after July 1, 1974. Therefore, it is determined that the $38.90875 per ton figure reported by the taxpayer as the produced value of its coal in 1974 is excessive and must be reduced to a figure accurately reflecting the actual value of such coal in the existing market during that period.

The taxpayer contends that the proper value to place on its 1974 production of metallurgical grade coal is the value reported to it by Eastern Associated Coal for purposes of computing royalty payments due to their lessor. Eastern's coal was shown to be of a quality and amount comparable to the taxpayer's production and was extracted from the same lease mined by the taxpayer.

Business and occupation tax regulation BOT 6.52.I.B.(2), effective prior to July 1, 1974, dictates the following methods for determining the production value of coal consumed by its producer:

(a) By applying to the products or articles the wholesale list prices of the producer or manufacturer.

(b) If no such list prices are available, by applying to the products or articles the average prices at which sales are made during the taxable year to regular customers of the producer or manufacturer.

(c) If no such sales are made or if the proceeds from such sales are relatively small and their average prices

> inconclusive, by applying to the products or articles the *average market prices* for products or articles of like quality or character obtained by other producers and manufacturers. (Emphasis added)

Business and occupation tax Reg. BOT § 1.2.A.2.d.(1), effective on July 1, 1974, on the same subject dictates that:

> (1) The value of the natural resource product consumed or used shall be determined according to the *selling price at the place of use or consumption of similar products* of like quality and character *by other taxpayers*. (Emphasis added)

When these regulations are applied to the present situation, it becomes apparent that BOT 6.52.I.B.(2)(c) and Reg. BOT § 1.2.A.2.d.(1) give the proper valuation method for the taxpayer's coal produced in 1974. Under these methods, the taxpayer must value its coal with reference to the average selling price of similar coal sold by other producers. The value of $19.801 per ton as reported by Eastern and argued for by the taxpayer fails to comply with the proper valuation methods as outlined in the above-quoted regulations. The taxpayer's figure is arrived at by reference to a single other coal producer. This figure, although representative of Eastern's average sales price, may not be representative of the average price realized by similarly situated producers generally as is required by the regulations.

After reviewing the record in the present proceeding with reference to the business and occupation tax regulations governing valuation, it is determined that the value of $26.80 per ton for high volatile metallurgical grade coal is the proper production value to report for business and occupation tax purposes. This value represents the selling price per ton received by other taxpayers for similar coal. Therefore, the present assessment must be modified under the production classification for the year 1974 to reflect this determination.

It is also noted for the record that the production values originally reported for the taxpayer's coal for the years 1970, 1971, 1972, 1973 and 1975 and accepted by the State's tax

examiner during the present audit are not in conformance with the above determination. In fact, the values reported by the taxpayer for coal production in those years were substantially lower than the values which would have been reported under the proper valuation procedure. However, a higher value cannot be assigned to the taxpayer's production for other years in the audit period because the State in its audit has assigned values which were not disputed by the taxpayer. The taxpayer, however, must in all years succeeding the audit period report its coal production in conformance with the determination on this point.

It is also determined that the sales value of $26.80 per ton must be used by the taxpayer to compute its liability under the manufacturing classification in 1974 for 287,863 tons of coal purchased by it and then processed through its tipple in West Virginia. The determination is in conformance with the previous determination concerning the valuation of the taxpayer's own coal produced in West Virginia.

The second issue for determination is whether sales made by the taxpayer's Steel Group and Union Wire Rope Group to West Virginia customers are properly subject to the business and occupation tax.

It is determined that these sales are properly subject to the business and occupation tax, and are, therefore, properly included in the present assessment. The taxpayer was "engaging or continuing within this State in the business of selling any tangible property . . . ." as required by West Virginia Code § 11-13-2c during the audit period by the activity of its non-resident salesmen in West Virginia. The taxpayer, through the efforts of its salesmen in-state, systematically solicited orders for the wholesale purchase of its products by West Virginia customers. This activity satisfies the requirements of Code § 11-13-2c because without the work engaged in by the salesmen in West Virginia these sales would not have transpired.

Sufficient nexus to allow taxation of these transactions can also be found from the activity of the taxpayer's salesmen in West Virginia. These salesmen solicited orders in-state. In addition, they engaged in follow up activity which included the

taking of succeeding orders and follow up calls on customers to check on their satisfaction with the taxpayer's products. All of these activities were carried out in a systematic and repetitive manner within West Virginia, and they are crucial to the development and maintenance of a market for the taxpayer's products in this State.

In *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964), the Supreme Court held that district managers and service representatives acting in a supervisory or advisory capacity over sales promotion were sufficient to create nexus to sustain a gross receipts tax on all sales within the State. These representatives made no solicitation of the taxed sales yet their activities provided the basis for taxing those sales. In *Standard Pressed Steel Co.* v. *State of Washington*, 419 U.S. 560, 42 L.Ed. 2d 719 (1975), nexus sufficient for taxation was found in the presence of one employee operating out of his home whose duty was to consult with customers regarding anticipated needs and to assist with any difficulties developing in the use of the products. Further, *United States Tobacco Company* v. *Commonwealth of Pennsylvania*, 348 A. 2d 755 (1975) held pursuant to the standard in *Standard Pressed Steel* that the presence of a foreign corporation's "missionary" representatives in-state whose job was promoting goodwill and soliciting sales for the company made possible the realization and continuance of valuable contractual relationships and thereby established sufficient nexus for taxation. Therefore, in line with these cases, it is determined that the activities of the taxpayer's salesmen in-state make possible the realization and continuance of valuable contractual relationships, and, thereby establish sufficient nexus for the State to impose the business and occupation tax on these transactions.

It is also determined that the taxpayer has not shown that the imposition of the business and occupation tax on these transactions would discriminate against interstate commerce. It is not enough that the taxpayer generally alleges a risk of discrimination or of multiple burdens. Specific discrimination or multiple burdens must actually be proved. *See: Complete Auto Transit, Inc.* v. *Brady*, ____ U.S. ____, 97 S.Ct. 1076, 51 L.Ed. 2d 326 (1977).

The next issue for determination is whether the wholesale sales made by the metal buildings sub-group of the taxpayer's Metal Products Division to West Virginia dealers are properly subject to the business and occupation tax.

It is determined that these sales are properly taxable by the State of West Virginia. In the present situation, the taxpayer allows the dealers to whom it makes sales to display its corporate name and trademark at their place of business and in advertisements and shares advertising expenses with the dealer to promote dealer sales to ultimate consumers. In addition, the Armco Building Dealer Agreement calls for close cooperation between the dealer and the taxpayer to assume the "development and mutual growth of their individual businesses." From the foregoing, it is apparent that the taxpayer has satisfied the requirements for taxability under Code § 11-13-2c and has created nexus sufficient to constitutionally allow the imposition of the business and occupation tax by the State because these activities are designed to develop and hold a market for the taxpayer's product by insuring that the dealers to whom the taxpayer sells its product have a sufficient market in which to resell the buildings.

Finally, it is determined that the taxpayer has shown reasonable cause for total waiver of the remaining statutory penalty imposed in those years of the assessment with tax liabilities still outstanding because of its good faith effort to interpret a substantial question of law governing the proper reporting of its business and occupation tax liability.

WHEREFORE, it is the DECISION of David C. Hardesty, Jr., Tax Commissioner of the State of West Virginia, that the business and occupation tax assessment issued against Armco Steel Corporation for the period 1970 through 1975 is hereby modified in accordance with the above determinations to reflect a net refund due the taxpayer in the amount of $155,475.09.

/s/ DAVID C. HARDESTY, JR.
David C. Hardesty, Jr.
State Tax Commissioner

December 10, 1977
Date Rendered

Appendix D

FINAL ORDER ENTERED BY THE SUPREME COURT OF APPEALS REVERSING THE JUDGMENT OF THE CIRCUIT COURT

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 25th day of May, 1983, the following order was made and entered, to-wit:

ARMCO INC., an Ohio Corporation, Plaintiff Below,
Appellee,

—VS.—

DAVID C. HARDESTY, JR., State Tax Commissioner of West Virginia, Defendant Below,
Appellant.

Upon an appeal from a judgment of the Circuit Court of Kanawha County rendered on the 20th day of July, 1981.

The Court having maturely considered the transcript of the record herein, and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is error in said judgment. It is therefore considered and ordered by the Court that the judgment of the Circuit Court of Kanawha County rendered in this cause on the 20th day of July, 1981, be, and the same is hereby, set aside, reversed and annulled, and that the appellant do recover of and form [sic] the appellee his costs about the prosecution of his appeal in this Court in this behalf expended. AND this action is remanded to the Circuit Court of Kanawha County for disposition according to the principles stated in the written

opinion aforesaid and further according to law; all of which is ordered to be certified to the Circuit Court of Kanawha County.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice Miller, was concurred in by Chief Justice McGraw and Justices Neely and Harshbarger. Justice McHugh, deeming himself disqualified, did not participate in the consideration or decision of this case.

A True Copy

Attest: /s/ GEORGE W. SINGLETON
Clerk Supreme Court of Appeals

Appendix E

NOTICE OF APPEAL

NO. 15437

IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

ARMCO, INC., an Ohio corporation,
Plaintiff Below, Appellee,

—v.—

DAVID C. HARDESTY, JR.,
State Tax Commissioner of West Virginia,
Defendant Below, Appellant.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Armco Inc., the appellee above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Appeals of West Virginia, entered in this proceeding on May 25, 1983, setting aside and reversing the judgment of the Circuit Court of Kanawha County entered July 20, 1981, reversing the determination and assessment of the Tax Commissioner of West Virginia of Business and Occupation Tax claimed to be due and owing the State by Armco Inc.

A copy of this Notice will also be filed in the Circuit Court of Kanawha County, West Virginia, inasmuch as the record has been returned from this Court to the Circuit Court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ G. THOMAS BATTLE

G. Thomas Battle
Spilman, Thomas, Battle & Klostermeyer
P. O. Box 273
Charleston, WV 25321
Phone: (304) 344-4081
Counsel for Appellee

AFFIDAVIT OF SERVICE

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

I hereby affirm and certify that service of the foregoing Notice of Appeal to the Supreme Court of the United States was made on the only party required to be served by mailing a true copy thereof to Appellant's attorney, Robert Digges, Jr., Assistant Attorney General, addressed to him at the Attorney General's Office, State Capitol, Charleston, West Virginia 25305, in the regular United States mail, postage prepaid, this 19th day of August, 1983.

/s/ G. THOMAS BATTLE

G. Thomas Battle
P. O. Box 273
Charleston, WV 25321
Phone: (304) 344-4081
Counsel for Appellee

Taken, subscribed and sworn to before me, a Notary Public in said county and state, this 19th day of August, 1983.
My commission expires August 13, 1984.

/s/ LINDA J. ROSS

Notary Public, Kanawha County, WV

Commissioned as Linda J. Mayville

Appendix F

DESIGNATION OF CORPORATE RELATIONSHIPS

Armco Inc., filing this Jurisdictional Statement as Appellant in this proceeding, states that:

This is its original Designation of Corporate Relationships.

Armco Inc. is not owned by any parent corporation.

Armco Inc. has an ownership interest in the following subsidiaries:

Accerex
Aceros Del Sur S.A.
Allied Investment Corporation
The American Life Insurance Company of New York
Armco-Bundy Ror AB
Armco Industrial S.A.
Armco Industries (Nigeria) Ltd.
Armco Jennings Finance Limited
Armco Marsteel Alloy Corporation
Armco Moly-Cop S.p.A.
Armco Peruana S.A.
Armco Robson (Pty.) Limited
Armco Thyssen GmbH
Australian Steel & Mining Corporation Pty. Ltd.
P. T. Bakrie—Armco
Bienes de Capital Imsa, S.A. de C.V.
Big Three Lincoln (U.K.) Limited
Black River Lime Company
Bundy Venezolana C.A.
Carryore, Limited
Chatillon-Armco S.A.
Court Galvanizing, Inc.
Court Galvanizing Limited
D.T.F.S.I.C.A.
Equipetrol Administracao E Participacoes Ltd.

Equipetrol, S.A.
Equipetrol Norte Industria E Commercio Ltd.
Falconbridge Dominicana C. por A.
Herman Smith HITCO Ltd.
IMSA National, S.A. de C.V.
Industrias National Supply C.A.
Iron Ore Company of Canada
Mansion Management Services Limited
Marine Mineral Industries, Inc.
Metaltubos C.A.
Middletown Enterprises, Inc.
Minera Cerro de Plata, S.A. de C.V.
Northern Land Company
Nuovi Tubi Brindisi SpA
Obras Civiles e Industrias C.A.
Oregon Metallurgical Corporation
Productos Metalicos Armco S.A.
Prolansa
Reserve Mining Company
Wilbur Smith and Associates Limited
State Surety Company
Technocargo-Transportes Especializados Ltd.
Torcad Limited

Armco Inc. does not have an ownership interest in any other subsidiaries (excepting only wholly owned subsidiaries).

Armco Inc. does not have any affiliates.

Dated: August 23, 1983

Appendix G

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article I, Section 8, Clause 3 (the "Commerce Clause"):

> The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with Indian tribes.

United States Constitution, Fourteenth Amendment (the "Due Process Clause"):

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

West Virginia Code:

> § 11-13-1. Definitions.
>
> * * *
>
> "Sale," "sales" or "selling" includes any transfer of the ownership of or title to property, whether for money or in exchange for other property.
>
> * * *
>
> "Gross income" means the gross receipts of the taxpayer, other than a banking or financial business, received as compensation for personal services and the gross receipts of the taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible property (real or personal), or service, or both, and all receipts by reason of the investment of the capital of the business engaged in, including rentals, royalties, fees, reimbursed costs or expenses or other emoluments however designated and including all interest, carrying charges, fees or other like income, however denominated, derived by the taxpayer from repetitive carrying of accounts, in the regular course and conduct of

his business, and extension of credit in connection with the sale of any tangible personal property or service, and without any deductions on account of the cost of property sold, the cost of materials used, labor costs, taxes, royalties paid in cash or in kind or otherwise, interest or discount paid or any other expenses whatsoever. "Gross income" of a banking or financial business is specified in section two-k [§ 11-13-2k] of this article.

"Gross proceeds of sales" means the value, whether in money or other property, actually proceeding from the sale of tangible property without any deduction on account of the cost of property sold or expenses of any kind.

* * *

"Selling at wholesale" or "wholesale sales" shall mean and include: (1) Sales of any tangible personal property for the purpose of resale in the form of tangible personal property; (2) sales of machinery, supplies or materials which are to be directly consumed or used by the purchaser in the conduct of any business or activity which is subject to the tax imposed by this article or by article twelve-A [§ 11-12A-1 et seq.] of this chapter; and (3) sales of any tangible personal property to the United States of America, its agencies and instrumentalities or to the State of West Virginia, its institutions or political subdivisions.

§ 11-13-2. Imposition of privilege tax.

There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined by the application of rates against values or gross income as set forth in sections two-a to two-k [§§ 11-13-2a to 11-13-2k], inclusive, of this article.

If any person liable for any tax under section two-a or two-b [§ 11-13-2a or 11-13-2b] shall ship or transport his products or any part thereof out of the State without making sale of such products, the value of the products in the condition or form in which they exist immediately

before transportation out of the State shall be the basis for the assessment of the tax imposed in said sections, except in those instances in which another measure of the tax is expressly provided. The tax commissioner shall prescribe equitable and uniform rules for ascertaining such value.

In determining value, however, as regards sales from one to another of affiliated companies or persons, or under other circumstances where the relation between the buyer and seller is such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale, the tax commissioner shall prescribe uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character where no common interest exists between the buyer and seller but the circumstances and conditions are otherwise similar.

Gross income included in the measure of the tax under sections two-a and two-b [§§ 11-13-2a or 11-13-2b] of this article shall neither be added nor deducted in computing the tax levied under the other sections of this article.

A person exercising any privilege taxable under sections two-a or two-b [§ 11-13-2a or 11-13-2b] of this article and engaging in the business of selling his natural resources or manufactured products at retail in this State shall be required to make returns of the gross proceeds of such retail sales and pay the tax imposed in section two-c [§ 11-13-2c] of this article for the privilege of engaging in the business of selling such natural resources or manufactured products at retail in this State. But any person exercising any privilege taxable under sections two-a or two-b [§ 11-13-2a or 11-13-2b] of this article and engaging in the business of selling his natural resources or manufactured products to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's

business shall not be required to pay the tax imposed in section two-c [§ 11-13-2c] of this article.

Manufacturers exercising any privilege taxable under section two-b [§ 11-13-2b] of this article shall not be required to pay the tax imposed in section two-c [§ 11-13-2c] of this article for the privilege of selling their manufactured products for delivery outside of this State, but the gross income derived from the sale of such manufactured products outside of this State shall be included in determining the measure of the tax imposed on such manufacturer in section two-b [§ 11-13-2b].

A person exercising privileges taxable under the other sections of this article, producing coal, oil, natural gas, minerals, timber or other natural resource products the production of which is taxable under section two-a [§ 11-13-2a], and using or consuming the same in his business or transferring or delivering the same as any royalty payment, in kind, or the like, shall be deemed to be engaged in the business of mining and producing coal, oil, natural gas, minerals, timber or other natural resource products for sale, profit or commercial use, and shall be required to make returns on account of the production of the business showing the gross proceeds or equivalent in accordance with uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character by other taxpayers, which rules the tax commissioner shall prescribe. (1921, c. 110, § 2; Code 1923, c. 31A; § 2; 1925, Ex. Sess., c. 1, §§ 2-2h; 1933; Ex. Sess., c. 33; 1935, c. 86; 1955, c. 165; 1971, c. 169.)

§ 11-13-2a. Severance, extraction and production of coal and other natural resource products.

Upon every person exercising the privilege of engaging or continuing within this State in the business of severing, extracting, reducing to possession and producing for sale, profit or commercial use any natural resource products,

the amount of such tax to be equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer, except as otherwise provided, multiplied by the respective rates as follows: Coal, three and five-tenths percent; limestone or sandstone, quarried or mined, two and two-tenths percent; oil, four and thirty-four one hundredths percent; natural gas, in excess of the value of five thousand dollars, eight and sixty-three one hundredths percent; blast furnace slag, four and thirty-four one hundredths percent; sand, gravel or other mineral product not quarried or mined, four and thirty-four one hundredths percent; timber, two and two-tenths percent; other natural resource products, two and eighty-six one hundredths percent. The measure of this tax is the value of the entire production in this State, regardless of the place of sale or the fact that the delivery may be made to points outside the State: Provided, however, that for the purposes of the production of oil classification, and the production of natural gas classification, as set forth in this section, multiple co-owners of oil or natural gas, in place, lessees thereof, or others being vested with title and ownership to part or all of the oil and gas, as personal property, immediately after severance, extraction, reduction to possession and production, except royalty recipients, in kind, shall be deemed to be a "group or combination acting as a unit" and one "person," as defined in section one [§ 11-13-1] of this article, if not otherwise defined therein, whenever engaged in the business of producing oil or natural gas through common use, by joint or separately executed contracts, of the same independent contractor driller or operator's services; and notwithstanding provisions of private contracts for separate deposit of gross receipts in separate members' accounts or for members of such group or combination to take in kind any proportionate part of such natural resources.

Lessees, sublessees or other denominated lessees are considered to be producers of all of the oil or natural gas

produced, regardless of any payment, in kind, to lessors, sublessors or other denominated lessors of a part of such natural resources as rents or royalties. Recipients of royalties or rents, in kind, in cash or otherwise are taxable on their gross income pursuant to the provisions of section two-i [§ 11-13-2i] of this article. (1935, c. 86; 1955, c. 165; 1959, c. 167; 1971, c. 169.)

§ 11-13-2b. Manufacturing, compounding or preparing products; processing of food excepted.

Upon every person engaging or continuing within this State in the business of manufacturing, compounding or preparing for sale, profit, or commercial use, either directly or through the activity of others in whole or part, any article or articles, substance or substances, commodity or commodities, or electric power produced by public utilities or others and not taxed under other provisions of this article, or newspaper publishing (including all gross income or proceeds of sale from circulation and advertising), the amount of the tax to be equal to the value of the article, substance, commodity or electric power or newspaper, manufactured, compounded or prepared for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same, except as otherwise provided, multiplied by a rate of eighty-eight one hundredths of one percent. The measure of this tax is the value of the entire product manufactured, compounded or prepared in this State for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the State. However, the dressing and processing of food by a person, firm or corporation, which food is to be sold on a wholesale basis by such person, firm or corporation shall not be considered as manufacturing or compounding, but the sale of these products on a wholesale basis shall be subject to the same tax as is imposed on the business of selling at wholesale as provided in section two-c [§ 11-13-2c].

It is further provided, however, that in those instances in which the same person partially manufactures, compounds or prepares products within this State and partially manufactures, compounds or prepares such products outside of this State the measure of his tax under this section shall be that proportion of the sale price of the product that the payroll cost of manufacturing within this State bears to the entire payroll cost of manufacturing the product; or, at the option of the taxpayer, the measure of his tax under this section shall be the proportion of the sales value of the articles that the cost of operations in West Virginia bears to the full cost of manufacture of the articles. (1935, c. 86; 1951, c. 179; 1955, c. 165; 1959, c. 167; 1967, c. 188; 1971, c. 169; 1974, c. 133.)

§ 11-13-2c. Business of selling tangible property; sales exempt.

Upon every person engaging or continuing within this State in the business of selling any tangible property whatsoever, real or personal, including the sale of food, and the services incident to the sale of food in hotels, restaurants, cafeterias, confectioneries, and other public eating houses, except sales by any person engaging or continuing in the business of horticulture, agriculture or grazing, or of selling stocks, bonds or other evidences of indebtedness, there is likewise hereby levied, and shall be collected, a tax equivalent to fifty-five one hundredths of one percent of the gross income of the business, except that in the business of selling at wholesale the tax shall be equal to twenty-seven one hundredths of one percent of the gross income of the business. (1935, c. 86; 1937, c. 105; 1955, c. 165; 1959, c. 167; 1971, c. 169.)